No. 12863

United States
Court of Appeals
for the Ninth Circuit.

THE OHIO CASUALTY INSURANCE COMPANY, a Corporation,

Appellant,

vs.

RUTH M. PETRO and JOHN PRESTON PETRO, an Infant by Ruth M. Petro, His Guardian Ad Litem,

Appellees.

Transcript of Record

Appeal from the United States District Court, Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

BETTS, ELY AND LOOMIS,
510 So. Spring St.,
Los Angeles 13, Calif.

For Appellees:

LASHER B. GALLAGHER,
BERTRAND RHINE,
458 S. Spring St.,
Los Angeles 13, Calif.

In the United States District Court, Southern District of California, Central Division
No. 11418-Y

RUTH M. PETRO and JOHN PRESTON PETRO, an Infant, by RUTH M. PETRO, His Guardian ad litem,

Plaintiffs,

vs.

THE OHIO CASUALTY INSURANCE COMPANY, a Corporation,

Defendant.

COMPLAINT ON JUDGMENT

Plaintiffs complain of defendant and for cause of action allege as follows:

I.

Plaintiff John Preston Petro is an infant of tender years and at all times herein mentioned was and now is a resident of the County of Los Angeles, State of California. Plaintiff Ruth M. Petro is an adult person and at all times herein mentioned was and now is a resident of the County of Los Angeles, State of California.

II.

Prior to the commencement of this action an order was duly given, made and entered by the Superior Court of the State of California, in and for the County of Los Angeles, whereby plaintiff Ruth M. Petro was appointed guardian ad litem of the infant plaintiff John Preston Petro for the pur-

pose of prosecuting any and all actions for the purpose of recovering damages resulting from the death of Walter John Petro and said order has not been modified or set aside and it is now in full force and effect.

III.

Plaintiffs are the surviving wife and son, respectively, of Walter John Petro, deceased.

IV.

At all times herein mentioned the defendant The Ohio Casualty Insurance Company, was and it now is a corporation, organized and existing pursuant to the laws of the State of Ohio and duly authorized to transact in the State of California the business of issuing aviation liability insurance policies.

V.

On or about the 5th day of December, 1948, at and within the County of Los Angeles, State of California, an airplane being piloted by said Walter John Petro and an airplane being piloted by one Phillip Ray Brown collided and as a proximate result thereof the said Walter John Petro was killed.

VI.

Thereafter, the plaintiffs commenced, in the Superior Court of the State of California, in and for the County of Los Angeles, an action for damages against the said Phillip Ray Brown on account of the death of said Walter John Petro caused by the careless and negligent manner in which the said Phillip Ray Brown piloted that certain Stinson air-

plane designated NC-6034M. As a result of said action the plaintiffs recovered a judgment in their favor and against the said Phillip Ray Brown in the sum of $50,000 and costs in the sum of $235.70 and said judgment was duly entered on the 16th day of August, 1949, in Book 2069, Page 144 of Judgments, records of said Superior Court of the State of California, in and for the County of Los Angeles, and said judgment is now a final judgment and no part thereof has been paid and the whole of said judgment is now due, owing and unpaid.

VII.

The said airplane designated NC-6034M was, at all times herein mentioned, owned by one Harry Phipps, doing business as Phipps Flying Service.

VIII.

On or about February 29, 1948, defendant, The Ohio Casualty Insurance Company, a corporation, issued and delivered to the said Harry Phipps, doing business as Phipps Flying Service, a certain policy of insurance designated "Aviation Liability Policy" and said policy was in full force and effect at all times from and including February 29, 1948, to and including February 29, 1949. Said policy provided that said airplane designated NC-6034M was covered under said policy and also provided that the aircraft would be used for the following purposes: Private business and pleasure, passenger carrying for hire or reward, rental to others and student instructions, and that the aircraft would be

operated only by the following pilots: Any private or commercial certificated and qualified pilot, also any student pilot while under the supervision of a commercial certificated pilot having a pilot instructor's rating issued by the Civil Aeronautics Administration.

IX.

At all times herein mentioned the said Phillip Ray Brown was a private certificated and qualified pilot and was piloting said airplane designated NC-3604M pursuant to the authority of a private pilot's certificate duly issued to him by the Civil Aeronautics Administration and said certificate was in full force and effect at all times mentioned herein.

X.

Said policy also provides that the defendant, The Ohio Casualty Insurance Company, a corporation, agreed "to pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, other than passengers, caused by accident and arising out of the ownership, maintenance or use of the aircraft."

XI.

Said policy provides that the term "Insured" shall include not only the Named Insured, Harry Phipps, doing business as Phipps Flying Service,

but also any other person while riding in, or a pilot approved thereunder, as hereinabove alleged, while operating such aircraft, provided such operation is with the permission of the Named Insured.

XII.

On the date and at the time of the collision between the two airplanes hereinabove referred to, the said airplane designated NC-6034M was being operated by said Phillip Ray Brown with the permission of the said Harry Phipps, doing business as Phipps Flying Service.

XIII.

Said policy also provides that the defendant, The Ohio Casualty Insurance Company, a corporation, will pay all costs taxed against the Insured and all interest accruing after entry of judgment until the defendant has paid, tendered or deposited in court, such part of such judgment as does not exceed the limit of the company's liability thereon.

XIV.

Said policy provides for a limit of liability in the sum of $50,000 by reason of the death of any one person in one accident.

XV.

Said policy also provides that any person who has secured a judgment against the Insured shall thereafter be entitled to recover under the terms of the policy in the same manner and to the same extent as the Insured.

XVI.

Plaintiffs allege that all conditions precedent have been performed.

Wherefore, plaintiffs pray judgment against the defendant in the sum of $50,235.70, together with interest thereon at the rate of 7% per annum from August 16, 1949, until paid, and for plaintiffs' costs of suit incurred in this action.

LASHER B. GALLAGHER, and
BERTRAND RHINE,

By /s/ BERTRAND RHINE,
Attorneys for Plaintiffs.

United States of America,
Northern District of Ohio—ss.

Ruth M. Petro, being first duly sworn, deposes and says: That she is one of the Plaintiffs in the above-entitled action; that she has read the foregoing Complaint on Judgment and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

/s/ RUTH M. PETRO.

Subscribed and sworn to before me this 6th day of April, 1950.

[Seal] /s/ DUDLEY DRACH,
Notary Public in and for the County of Cuyahoga,
State of Ohio.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 11, 1950.

[Title of District Court and Cause.]

ANSWER OF THE OHIO CASUALTY INSURANCE COMPANY

Comes Now the defendant, The Ohio Casualty Insurance Company, a corporation, and in answer to plaintiffs' complaint admits, denies and alleges as follows:

I.

In answer to Paragraph VI admits that the said judgment and the whole thereof is unpaid, but denies that the payment of said judgment, or any part thereof, is now or at any other time was due from this defendant, and denies that the payment of said judgment, or any part thereof, is or at any other time was owing from this defendant.

II.

In answer to Paragraph VIII admits that the said policy contained the provisions alleged in Paragraph VIII, but alleges that the provisions alleged in Paragraph VIII were not the only provisions contained in the said policy with respect to the insuring agreements, conditions and exclusions of the said policy. A true and complete copy of said policy is attached hereto as Exhibit "A" and made a part of this answer, except that the following matter contained in the said policy has been omitted from the said Exhibit "A": Various indorsements which pertain only to the addition of certain airplanes to the list of those covered under the said policy or to the withdrawal of certain airplanes

from the list of those covered under the said policy, none of which indorsements pertain to the said airplane NC-6034*N*, and certain indorsements pertaining to the premium earned during certain periods.

III.

In answer to Paragraph IX, alleges that it lacks information or belief sufficient to enable it to answer the allegation that the said Phillip Ray Brown was a qualified pilot, and basing its denial upon such lack of information or belief denies that the said Phillip Ray Brown was a qualified pilot.

IV.

In answer to Paragraph X, alleges that the provisions of the policy alleged in Paragraph X were not all of the provisions of the policy with respect to the obligations of the insurer thereunder, and in this respect alleges that the obligations of the insurer were such as were set forth in the said policy made a part thereof as said Exhibit "A."

V.

In answer to Paragraph XI, denies generally and specifically each and every allegation contained therein. In this respect defendant alleges that the persons covered under the said policy in addition to the said named assured, Harry Phipps, doing business as Phipps Flying Service, were those, and only those, specified in Clause III of "Insuring Agreements" of said policy, said Clause III being entitled "Additional Insured."

VI.

In answer to Paragraph XVI, defendant admits that at all times mentioned in the complaint the said policy was in full force and effect, but denies that the said Phillip Ray Brown had performed any conditions precedent or any conditions at all with respect to the said policy, and denies that the said Phillip Ray Brown was a person insured under the said policy.

Special Affirmative Defense

I.

For a Further, Separate and Affirmative Defense to Plaintiffs' Complaint Defendant Alleges as Follows:

That the said policy in Clause III of "Insuring Agreements" excluded from the coverage afforded by the said policy

> "(e) any persons other than officers, executives and employees of the named Insured, or any agent of the named Insured, if the business of the named Insured (insured as such) is that of an aircraft manufacturer, or aircraft engine manufacturer, or aircraft repair or service station, or aircraft sales agency, or hangar keeper, or airport operator;
>
> "(f) or any person who is a student or renter pilot."

That the time of the accident alleged in the complaint, the said Phillip Ray Brown was a student pilot and was piloting the airplane alleged to have

collided with the airplane piloted by the said Walter John Petro in the course of his training as a student pilot; that the said airplane being piloted by the said Phillip Ray Brown at the time of the said accident was rented from the said Harry Phipps, doing business as Phipps Flying Service, for the use of the said Phillip Ray Brown and the said Phillip Ray Brown was operating the said airplane as a renter pilot. That at all times mentioned in the complaint the said Harry Phipps, doing business as Phipps Flying Service, was a hangar keeper, and at none of the times mentioned in the complaint was the said Phillip Ray Brown an officer or executive or employee of the said Harry Phipps and at none of the times mentioned in the complaint was the said Phillip Ray Brown an officer or executive or employee of any person, firm, or corporation covered under the said policy.

Wherefore, defendant prays that plaintiffs take nothing herein and that this defendant be awarded judgment for its costs of suit herein incurred.

PARKER, STANBURY,
REESE & McGEE,

By /s/ WHITE McGEE, JR.,
Attorneys for Defendant, The Ohio Casualty Insurance Company, a corporation.

[Exhibit A attached to the foregoing Answer is identical to Plaintiffs' Exhibit No. 3. See pages 124 to 136 of this printed record.

State of California,
County of Los Angeles—ss.

White McGee, Jr., being first duly sworn, deposes and says: That he is one of the attorneys for the defendant, The Ohio Casualty Insurance Company, a corporation, in the above-entitled action; that he makes this verification for and on behalf of the said defendant for the reason that the said defendant has no officer in the County of Los Angeles, State of California, the county in which affiant has his office.

By /s/ WHITE McGEE, JR.

Subscribed and sworn to before me this 15th day of May, 1950.

[Seal] /s/ MARY O. TERPENNING,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed May 15, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly to be tried on the 5th day of December, 1950, before the Honorable Leon R. Yankwich, United States District Judge, trial by jury having been expressly waived by both parties, the plaintiffs appearing by Lasher B. Gallagher, Esq., and Bertrand Rhine, Esq., and the defendant appearing by White Mc-

Gee, Jr., Esq., of Parker, Stanbury, Reese & McGee, and evidence both oral and documentary having been introduced, the action was submitted on the testimony taken in open court, together with exhibits offered in evidence in connection therewith, and the parties having agreed that the sole and exclusive issue relied upon by the defendant was whether or not Philip Ray Brown was a "student pilot" or "renter pilot" as said words are used in the Aviation Liability Policy issued by the defendant, and counsel for the respective parties having fully argued the issues; and the Court being fully advised in the premises, now makes the following Findings of Fact:

Findings of Fact

I.

Plaintiff John Preston Petro is an infant of tender years and at all times herein mentioned was and now is a resident of the County of Los Angeles, State of California. Plaintiff Ruth M. Petro is an adult person and at all times herein mentioned was and now is a resident of the County of Los Angeles, State of California.

II.

Prior to the commencement of the above-entitled action an order was duly given, made and entered by the Superior Court of the State of California, in and for the County of Los Angeles, whereby plaintiff Ruth M. Petro was appointed guardian ad litem of the infant plaintiff John Preston Petro

for the purpose of prosecuting any and all actions for the purpose of recovering damages resulting from the death of Walter John Petro and said order has not been modified or set aside and it is now in full force and effect.

III.

Plaintiffs are the surviving wife and son, respectively, of Walter John Petro, deceased.

IV.

At all times herein mentioned the defendant The Ohio Casualty Insurance Company, was and it now is a corporation, organized and existing pursuant to the laws of the State of Ohio and duly authorized to transact in the State of California the business of issuing aviation liability insurance policies.

V.

On or about the 6th day of December, 1948, at and within the County of Los Angeles, State of California, an airplane being piloted by said Walter John Petro and an airplane being piloted by one Philip Ray Brown collided and as a proximate result thereof the said Walter John Petro was killed.

VI.

Thereafter the plaintiffs commenced in the Superior Court of the State of California, in and for the County of Los Angeles, an action for damages against the said Philip Ray Brown on account of the death of said Walter John Petro caused by the careless and negligent manner in which the said

Philip Ray Brown piloted that certain Stinson airplane designated NC-6034M. As a result of said action the plaintiffs recovered a judgment in their favor against the said Philip Ray Brown in the sum of $50,000 and costs in the sum of $235.70 and said judgment was duly entered on the 16th day of August, 1949, in Book 2069, Page 144 of Judgments, records of said Superior Court of the State of California, in and for the County of Los Angeles, and said judgment is now a final judgment and no part thereof has been paid and the whole of said judgment is now due, owing and unpaid. It is true that the payment of said judgment was and is owing from the defendant to the plaintiffs.

VII.

That said airplane designated NC-6034M, at all times herein mentioned, was owned by one Harry Phipps, doing business as Phipps Flying Service.

VIII.

On or about February 29, 1948, defendant, The Ohio Casualty Insurance Company, a corporation, issued and delivered to the said Harry Phipps, doing business as Phipps Flying Service, a certain policy of insurance designated "Aviation Liability Policy" and said policy was in full force and effect at all times from and including February 29, 1948, to and including February 29, 1949. Said policy provided that said airplane designated NC-6034M was covered under said policy and also provided that the aircraft would be operated only by the following pilots: Any private or commercial certificated and qualified pilot also any student pilot

while under the supervision of a commercial certificated pilot having a pilot instructors rating issued by the Civil Aeronautics Administration. It is true that a true and complete copy of said policy, with the exception of various endorsements which pertain only to the addition of certain airplanes to the list of those covered under the said policy or to the withdrawal of certain airplanes from the list of those covered under the said policy, none of which endorsements pertain to airplane NC-6034M and certain endorsements pertaining to the premium earned during certain periods, is attached to defendant's Answer as Exhibit "A."

IX.

At all times herein mentioned the said Philip Ray Brown was a private certificated and qualified pilot and was piloting said airplane designated NC-6034M pursuant to the authority of a private pilot certificate duly issued to him by the Civil Aeronautics Administration and said certificate was in full force and effect at all times mentioned herein.

X.

Said policy also provides that the defendant, The Ohio Casualty Insurance Company, a corporation, agreed "to pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained

by any person or persons, other than passengers, caused by accident and arising out of the ownership, maintenance or use of the aircraft."

XI.

Said policy provides that the term "Insured" shall include not only the Named Insured, Harry Phipps, doing business as Phipps Flying Service, but also any other person while riding in, or a pilot approved thereunder, as hereinabove set forth, while operating such aircraft, provided such operation is with the permission of the Named Insured.

XII.

On the date and at the time of the collision between the two airplanes hereinabove referred to, the said airplane designated NC-6034M was being operated by said Philip Ray Brown with the permission of the said Harry Phipps, doing business as Phipps Flying Service.

XIII.

Said policy also provides that the defendant, The Ohio Casualty Insurance Company, a corporation, will pay all costs taxed against the Insured and all interest accruing after entry of judgment until the defendant has paid, tendered or deposited in court, such part of such judgment as does not exceed the limit of the company's liability thereon.

XIV.

Said policy provides for a limit of liability in the sum of $50,000 by reason of the death of any one person in one accident.

XV.

Said policy also provides that any person who has secured a judgment against the Insured shall thereafter be entitled to recover under the terms of the policy in the same manner and to the same extent as the Insured.

XVI.

It is true that all conditions precedent have been performed.

XVII.

Said policy was in full force and effect at all times mentioned in the complaint and the said Philip Ray Brown was a person insured under the said policy.

XVIII.

The Court finds that the parties, by agreement, have limited the disputed issues as raised by the pleadings to the following: Was Philip Ray Brown, at the time of the accident on December 5, 1948, a "student pilot" and "renter pilot" or a "student pilot" or "renter pilot" within the meaning of those words as used in the policy issued by the defendant?

XIX.

It is not true that at the time of the accident alleged in the complaint the said Philip Ray Brown was a student pilot or was piloting the airplane alleged to have collided with the airplane piloted by said Walter John Petro in the course of his training as a student pilot, but was piloting said airplane pursuant to his privilege and authority as the holder of a valid and effective private pilot certificate there-

tofore issued to him by the Civil Aeronautics Administration.

XX.

It is not true that the said Philip Ray Brown was operating the said airplane as a renter pilot. It is not true that said Philip Ray Brown was a renter pilot. It is not true that the said Harry Phipps, doing business as Phipps Flying Service, was a hangar keeper. It is true that at none of the times mentioned in the complaint was the said Philip Ray Brown an officer or executive or employee of the said Harry Phipps or an officer or executive or employee of any person, firm, or corporation covered under the said policy.

XXI.

On December 5, 1948, there was in full force and effect a written contract executed by and between Harry Phipps, doing business as Phipps Flying Service, and the Veteran's Administration, an agency of the United States Government, and pursuant to the terms of said written contract the said Harry Phipps, doing business as Phipps Flying Service furnished for the use of said Philip Ray Brown on said December 5, 1948, said airplane designated NC-6034M.

XXII.

The Court finds that the words "student pilot" as used in the policy of insurance issued by the defendant were intended to and do mean a person holding a valid "student pilot certificate" issued pursuant to the provisions of Part 20 of the Civil Air Regulations and the Court also finds that the words "stu-

dent pilot" as used in the policy of insurance issued by the defendant were not intended to and do not refer to any person holding a valid private pilot certificate issued pursuant to the provisions of Part 20 of the Civil Air Regulations. The Court finds that the words "private certified and qualified pilot" as used in the policy issued by the defendant mean and refer to a person holding a valid "private pilot certificate" issued pursuant to the provisions of Part 20 of the Civil Air Regulations.

XXIII.

The Court finds that on December 5, 1948, at the time of the accident referred to in plaintiffs' complaint, the said Philip Ray Brown was a private certificated and qualified pilot and as such was a pilot approved under the policy.

Conclusions of Law.

I.

Plaintiffs are entitled to judgment against the defendant in the principal sum of $50,235.70, with interest thereon at the rate of 7% per annum from August 16, 1949, until paid, which said interest, to and including December 26, 1950, amounts to the sum of $4,788.19, together with plaintiffs' costs of suit incurred herein.

The Clerk is directed to enter judgment accordingly.

Dated: January 3, 1951.

/s/ LEON R. YANKWICH,
United States District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 3, 1950.

In the United States District Court, Southern District of California, Central Division
No. 11418-Y

RUTH M. PETRO and JOHN PRESTON PETRO, an Infant, by RUTH M. PETRO, his Guardian ad litem,

Plaintiffs,

vs.

THE OHIO CASUALTY INSURANCE COMPANY, a Corporation,

Defendant.

JUDGMENT

The above-entitled action came on regularly to be tried on the 5th day of December, 1950, before the Honorable Leon R. Yankwich, United States District Judge, trial by jury having been expressly waived by both parties, the plaintiffs appearing by Lasher B. Gallagher, Esq., and Bertrand Rhine, Esq., and the defendant appearing by White McGee, Jr., Esq., of Parker, Stanbury, Reese & McGee, and evidence both oral and documentary having been introduced, the action was submitted on the testimony taken in open court, together with exhibits offered in evidence in connection therewith, and the parties having agreed that the sole and exclusive issue relied upon by the defendant was whether or not Philip Ray Brown was a "student pilot" or "renter pilot" as said words are used in the Aviation Liability Policy issued by the defendant, and counsel for the respective parties having

fully argued the issues; and the Court being fully advised in the premises and having rendered its decision directing a judgment in favor of the plaintiffs and against the defendant; and written Findings of Fact and Conclusions of Law having been duly made in accordance therewith, and the plaintiffs' costs having been duly taxed in the sum of $111.05;

It Is Hereby Ordered, Adjudged and Decreed that Plaintiffs, Ruth M. Petro and John Preston Petro, an infant, by Ruth M. Petro, his guardian ad litem, recover from the defendant, The Ohio Casualty Insurance Company, a corporation, the principal sum of $50,235.70, with interest thereon at the rate of 7% per annum from August 16, 1949, until paid, which said interest, to and including December 26, 1950, amounts to the sum of $4,788.19, together with plaintiffs' costs as taxed.

Dated: January 3, 1951.

/s/ LEON R. YANKWICH,
United States District Judge.

Approved as to form:

PARKER, STANBURY,
REESE & McGEE,
Attorneys for Defendant.

Memorandum to Clerk Re Interest

Interest on the principal sum of $50,235.70 is payable at the rate of $9.634 per day.

Judgment entered Jan. 3, 1951.

Receipt of copy acknowledged.

[Endorsed]: Filed January 3, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Plaintiffs in the Above-Entitled Action, Lasher B. Gallagher and Bertrand Rhine, Their Attorneys, and to the Clerk of the Above-Entitled Court:

You and Each of You Will Please Take Notice that the defendant Ohio Casualty Insurance Company hereby appeals to United States Court of Appeals for the Ninth Circuit, from the judgment heretofore entered in the above action on January 3, 1951, in Book No. 70, Page 126, of records of the above-entitled court, and from the whole of said judgment.

PARKER, STANBURY,
REESE & McGEE,

By /s/ WHITE McGEE, JR.
Attorneys for defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 22, 1951.

[Title of District Court and Cause.]

REQUEST FOR CLERK'S TRANSCRIPT AND REPORTER'S TRANSCRIPT ON APPEAL

To the Clerk of the Above-Entitled Court:

The defendant Ohio Casualty Insurance Company having filed its notice of appeal to the Circuit Court of Appeals for the Ninth Circuit from the whole of the judgment heretofore rendered in said action, you are hereby requested to prepare a transcript of the record in the above-entitled action for transmittal to the said Court of Appeals. The said record shall consist of copies of all pleadings, the findings of fact and conclusions of law and the direction for the entry of judgment thereon, the opinion of the court, the notice of appeal with date of filing, the designations of the parties as to matter to be included in the record, all stipulations of the parties appearing in the clerk's records, minutes, and proceedings, the whole of the judgment from which this appeal is taken, all exhibits introduced into evidence except the parts thereof required by law to be deleted from a record on appeal, and the stenographic reporter's transcript of all the evidence, stipulations and proceedings on the trial of the said action. The clerk is further requested to direct the stenographic reporter at the trial of the said action to prepare the said reporter's tran-

script with such copies thereof as are required by law.

PARKER, STANBURY,
REESE & McGEE,

By /s/ WHITE McGEE, JR.
Attorney for defendant, The Ohio Casualty Insurance Company, a corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 22, 1951.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the Above-Entitled Court, to the Plaintiffs in the Above-Entitled Action, and to Their Attorneys, Lasher B. Gallagher and Bertrand Rhine:

You, and Each of You, Will Please Take Notice that the defendant The Ohio Casualty Insurance Company hereby makes its designation of the portions of the record, procedings and evidence to be contained in the record on appeal:

1. All the pleadings.

2. The findings of fact and conclusions of law, together with the direction for the entry of judgment thereon.

3. The opinion of the Court.

4. The judgment.

5. The notice of appeal with date of filing.

6. The designations and stipulations of the parties as to matter to be included in the record.

7. All Exhibits.

8. The stenographic reporter's transcript of all the evidence and all the proceedings and stipulations at the trial of the above-entitled action, including the opinion of the Court.

The said transcript has not been filed because it has not yet been completed, but the stenographic reporter reporting the said trial has been requested to prepare the said transcript and is now preparing it. Defendant will file the said transcript promptly when the preparation of it has been completed.

PARKER, STANBURY,
REESE & McGEE,

By /s/ WHITE McGEE, JR.

Attorneys for Defendant, The Ohio Casualty Insurance Company, a corporation.

Approved as to form:

LASHER B. GALLAGHER and
BERTRAND RHINE,

By /s/ LASHER B. GALLAGHER.

Receipt of copy acknowledged.

[Endorsed]: Filed January 30, 1951.

In the United States District Court, Southern District of California, Central Division
No. 11,418-Y Civil

RUTH M. PETRO and JOHN PRESTON PETRO, an Infant, by RUTH M. PETRO, his guardian ad litem,

Plaintiffs,

vs.

THE OHIO CASUALTY INSURANCE COMPANY, a Corporation,

Defendant.

Honorable Leon R. Yankwich, Judge Presiding.

Reporter's Transcript of Proceedings

December 5, 1950

Appearances:

For the Plaintiffs:

LASHER B. GALLAGHER, ESQ.,
458 South Spring Street,
Los Angeles, California,

BERTRAND RHINE, ESQ.,
729 Citizens National Bank Bldg.,
Los Angeles, California.

For the Defendant:

PARKER, STANBURY, REESE & McGEE,
WHITE McGEE, JR., ESQ.,
707 South Hill Street,
Los Angeles, California.

Tuesday, December 5, 1950—10:30 A.M.

The Clerk: 11418-Y, Ruth M. Petro and John Preston Petro, an infant, by Ruth M. Petro, his guardian ad litem, v. The Ohio Casualty Insurance Company, a corporation.

Mr. Gallagher: Ready for the plaintiffs.

Mr. McGee: The defendant is ready.

The Clerk: Will counsel state they have waived the jury, for the record?

Mr. Gallagher: So far as the plaintiff is concerned, she waives a jury trial.

Mr. McGee: The defendant has waived.

The Court: Proceed, gentlemen.

Opening Statement on Behalf of the Plaintiff

By Mr. Gallagher:

May it please the Court, in this matter I believe that I can state for both sides that the sole and only issue of law and/or fact, if there is any question of fact in the case, will be and is whether Philip Ray Brown was, on December 5, 1948, at the time of the happening of the events out of which this litigation arose, "a student or renter pilot."

If Mr. Philip Ray Brown was at the time "a student or renter pilot," then he was not an additional insured under the policy, and the defendant would be entitled to a judgment. [2*]

If, on the other hand, Philip Ray Brown was not at that time "a student or renter pilot," the plaintiffs are entitled to judgment.

The Court: As I understand, judgment has been obtained against the insured.

*** Page numbering appearing at top of page of original Reporter's Transcript of Record.**

Mr. Gallagher: The defendant claims that the man against whom the judgment was obtained, if your Honor please, was not an insured.

The Court: I understand that. The claimed insured.

Mr. Gallagher: Yes, your Honor.

The Court: The claimed insured. I should have put it that way.

Mr. Gallagher: We have obtained a judgment which is final against the person we claim is an additional insured, pursuant to the provisions of subdivision III of the insurance agreement in the policy.

I believe that a true and correct copy of the portions of the policy which are of importance here is attached to the defendant's answer.

Now, the plaintiffs will state the facts as they understand them to be, which are as follows:

The claimed insured, Philip Ray Brown, was a member of the armed forces of the United States during World War II, and as a result of that service he was entitled to certain training under the GI Bill of Rights. [3]

He went to a certain flying school, not the one referred to in the pleadings, and commenced taking a course in order to become a qualified and certificated pilot. Prior to taking any instruction in that course, he was issued, as was required by the provisions of the Civil Air Regulations, a student pilot permit or certificate, as it might also be called.

He took a course of instruction consisting of ground instruction and flight training, and, as I

understand the facts, he did not quite finish the preliminary course at the first school. He then transferred to the school owned and conducted by a Mr. Phipps, who is the named insured under the policy.

Mr. Phipps had a contract likewise with the Veterans Administration, and that contract required Mr. Phipps to furnish to qualified veterans such training and the use of equipment as might be required for the purpose of attaining two types of licenses: one, a private pilot's certificate or license, also sometimes referred to as an airman's certificate. And, second, a commercial pilot's certificate.

Now, this young man, Mr. Philip Ray Brown, obtained his private pilot's certificate with what is called a single-engine land airplane rating sometime early in the year 1948. I think the evidence will show that that private pilot's certificate was issued to him in or about the month of March, 1948. [4]

Between the time he obtained that certificate and the time of the accident on December 5, 1948, he was at all times a duly and regularly certificated and qualified pilot. During that time he had accumulated some 130 or 150 hours of solo flight.

On December 5, 1948, Mr. Brown was piloting, as the sole person in command and charge, an airplane owned by Mr. Phipps and furnished by Mr. Phipps to Mr. Brown and paid for on an hourly basis by the Government, pursuant to the contract.

Now, I will call your Honor's attention to the fact that the regulations pursuant to which the various types of pilot's certificates are set forth are in the Civil Air Regulations, in Part 20.

The Court: Mr. Gallagher, as these would have to be offered in evidence, unless they are published in the Federal Register, I do not take judicial notice of them. I think you had better confine yourself to referring to them, and let us get down to what facts have to be offered that cannot be stipulated, after I hear from Mr. McGee as to his conception of the issues.

Mr. Gallagher: Very well, your Honor. The evidence will show, and your Honor has it before you, that the policy provides that the aircraft will be used only for the [5] following purposes: "Private business and pleasure, passenger carrying for hire or reward, rental to others and student instruction.

"The aircraft will be operated only by the following pilots: Any private or commercial certificated and qualified pilot, also any student pilot while under the supervision of a commercial certificated pilot having a pilot instructor's rating issued by the C.A.A."

Our evidence will show that Mr. Brown was, at the time, a private and qualified pilot, duly certificated. He was flying the airplane——

The Court: In other words, the problem here is that you claim he comes under the main coverage and they claim he comes under the exception.

Mr. Gallagher: Yes, your Honor. We claim that a student pilot is a pilot who is certificated as such, and that Mr. Brown, being a duly qualified and certificated private pilot, and pursuant to his license, being able to fly the type of airplane any-

where within the limits of the United States, without any further ado, as long as he could get the permission of the owner of the aircraft to do so, was not a student pilot but was one of the other classes of pilots mentioned in the policy.

The Court: In other words, it is more like a lawyer taking a refresher course—— [6]

Mr. Gallagher: Yes, your Honor, or a doctor.

The Court: ——than a law student?

Mr. Gallagher: That is right. Or a doctor taking a postgraduate course might be a student physician. We claim this man was not a renter pilot because we respectfully submit that "renter" is an adjective and defines pilot. This man did not rent the airplane, didn't agree to pay for it, and wasn't billed for it.

The Court: All right. Mr. McGee.

Opening Statement on Behalf of the Defendant

By Mr. McGee:

Your Honor, Mr. Gallagher has made a statement of facts which is substantially correct. I might supplement them to this extent: As has been stated, at the time of this accident Philip Ray Brown was in the course of training at this flying school for a commercial pilot's license. His activities in connection with the flight resulting in the accident were wholly within the course of his training in this school as a student. He still had a good many hours to complete before he was qualified and could take his examination for a student or commercial pilot's license.

He was at all times, so far as any activities related to this accident were concerned, under the supervision of the school. The flight that he was taking at the time this accident happened was under supervision in that he had been told [7] by the instructor at the school what he was to do on that particular day, the area in which he was to fly.

He never went up unless he was told he could go up. He never went up unless the school told him weather conditions were right and unless he was acting under their instructions.

We contend that he was both a student and a renter pilot within the meaning of clause III of the insuring agreements, which your Honor has referred to as exclusions. I think, as we get into the case, it will probably appear that these are not exclusions, at least in a technical sense, but we are dealing with the insuring agreement itself.

I assume that your Honor cares for a minimum of argument.

The Court: That is right. I do not want the argument now. I want facts. I merely want an opening statement to see what the issues are.

Mr. McGee: I will make this statement, your Honor, as to our claim with reference to the student pilot phase of this question: The part of the policy which Mr. Gallagher referred to, containing the wording: "The aircraft will be operated only by the following pilots: Any private or commercial certificated and qualified pilot, also any student pilot while under the supervision of a commercial certificated pilot having a pilot instructor's rating

issued by the C.A.A.," is a part of the declarations of the policy defining the uses to which the subject airplanes will be put. In other [8] words, it defines the scope of the insurance as to the named assured, Harry Phipps, doing business as Phipps Flying Service. This is in the declarations defining the uses to which a plane must be put in order for the coverage to attach.

The insuring agreement, clause III, in defining "insured" excludes from the coverage any student pilot. Our claim is that Mr. Phipps and his flying school were covered, provided the uses were such as specified in the declarations, but in no event was a student pilot covered. It is our contention Philip Ray Brown was a student pilot.

Next, that he was also a renter pilot. The clause here was in the disjunctive, "student or renter pilot." He was a renter pilot, in that the rental or hiring of the plane was paid for by the Government as a part of the course he was taking. It was paid by the Government on his behalf. He was as much a renter pilot as if he himself had paid the money. It was paid on his behalf, and he was availing himself——

The Court: I do not think the relationship of renter and owner is determined by the question of who pays the rent. The relationship is determined by other criteria. I presume the word "renter" there is used in the sense of hire, that is, it is a temporary letting or hiring of the use of an airplane for a definite period, for which a definite sum is paid.

Mr. McGee: That is our position precisely.

The Court: It is like the rental of an automobile. [9] Eliminating taxicabs, we have such companies as the Tanner Company, who for many, many years have been engaged in the business of renting automobiles. You call them up and they will rent you an automobile with a driver and everything that goes with it, for an hour or for a day. And whether you pay it or charge it to your company or anyone else does not affect the relationship.

Mr. McGee: That is exactly our position.

The Court: Well, I am just giving my reaction to your statement. I am not deciding any question. I am just trying to figure out what facts will be necessary to be proved.

We have two depositions here, gentlemen. I do not know what they are. They have not been opened. If you are ready for them I will order the clerk to open them for such use as you may desire to make of them.

Mr. Gallagher: We would like to have them opened, your Honor, although the witnesses are here.

The Court: That is all right. You may want to use them for cross-examination.

Mr. Gallagher: Mr. Brown.

PHILIP R. BROWN

called as a witness by and on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Philip R. Brown. **[10]**

Direct Examination

By Mr. Gallagher:

Q. Mr. Brown, where do you live?

A. 11828 Chandler.

Q. What is your age? A. 30.

Q. Were you in the armed services during the last World War? A. Yes, sir.

Q. As such, did you take advantage of the GI Bill of Rights and start at some time to learn how to fly an airplane? A. Yes, sir.

Q. At what school did you start to learn to fly?

A. Compton Air College, in Compton, California.

Q. That school had nothing whatever to do with Mr. Phipps? A. No, sir.

Q. Now, before you took any flight instruction did you obtain a student pilot's certificate or permit? A. Yes, sir.

Q. How long did you hold that student pilot's certificate or permit?

A. I don't know, I don't remember it. About three or four months, or longer, I guess.

Q. Was that a certificate or permit issued to

(Testimony of Philip R. Brown.)

you by [11] a representative of the Civil Aeronautics Authority of the United States Government?

A. Yes.

Q. An agency of the Government?

A. Yes, sir.

Q. During that period when you had the student pilot's permit, did you build up a sufficient number of solo hours to permit you to take an examination, both written and flight, for the purpose of acquiring an actual rating as a pilot?

A. Private pilot.

Q. Did you take the number of hours and take the examination in order to acquire the private pilot's certificate? A. Yes, sir.

Q. Were you at the Compton Air College at Compton when you obtained your airman's certificate and your private pilot rating? A. No.

Q. Where were you at the time you obtained your airman's certificate and your private pilot's rating from the C.A.A., Civil Aeronautics Administration or Authority?

A. San Fernando, Phipps Flying Service.

Q. Prior to the time you obtained the airman's certificate or private pilot's certificate, whatever you want to call it, had you built up a sufficient number of hours to permit you to do that? [12]

A. Yes.

Q. Did you take a written examination?

A. I took one, yes.

Q. Now, in order to qualify as a private pilot,

(Testimony of Philip R. Brown.)

upon what subjects were you examined, so far as the written examination was concerned?

A. Civil Air Regulations. It was traffic, air traffic.

Mr. Gallagher: Maybe we can cut this short. I will try.

Q. (By Mr. Gallagher): Mr. Brown, did you take an examination covering all of the subjects referred to in the Civil Air Regulations as requisite for the issuance of a private pilot's certificate?

A. Yes, sir.

Q. For a rating as a private pilot for single-engine land airplanes? A. Yes.

Q. Did some qualified representative of the Civil Aeronautics Authority or Administration issue to you at that time such a private pilot's certificate and rating? A. Yes, sir.

Q. Your answer is "Yes"? A. Yes.

Q. Now, was that rating for single-engine land airplanes? A. Yes. [13]

Q. Were there any restrictions with reference to horsepower, so long as the airplane was a single-engine land airplane? A. I don't think so.

Q. Were you, on December 5, 1948, involved in an airplane accident? A. Yes, sir.

Q. You were flying one of Mr. Phipps' airplanes? A. Yes, sir.

Q. At that time were you a private certificated and qualified pilot?

A. I had a private pilot's certificate.

Q. You had it with you? A. Yes, sir.

(Testimony of Philip R. Brown.)

Q. Did you have any other type of certificate or license entitling you to fly that airplane?

A. No, sir.

Q. Did you pay Mr. Phipps for the use of that airplane on that day? A. No, sir.

Q. Did you agree to pay him for the use of that airplane personally? A. No, sir.

Q. Had you at any time paid for the use of any airplane that you flew, while you were attending Mr. Phipps' institution? [14]

A. I rented airplanes from him, yes.

Q. You did on occasion rent airplanes from Mr. Phipps? A. Yes.

Q. How would you accomplish that? How did you do it?

A. Well, I would just go to the chief pilot in charge and take the airplane up for a certain number of hours, and then, when I returned it, pay him for the time.

Q. But on this particular day, December 5, 1948, you obtained the use of the airplane because of your rights as a GI trainee, is that right?

A. Yes, sir.

Q. What kind of an airplane was it?

A. Stinson 165.

Q. Cabin airplane? A. Yes, sir.

Q. Single-engine? A. Yes.

Q. Land airplane? A. Yes.

Q. Four-passenger ship? A. Yes, sir.

Q. Powered with what engine?

A. 165-horsepower engine.

(Testimony of Philip R. Brown.)

Q. Were you at that time building up time toward acquiring a commercial pilot's license? [15]

A. Yes, sir.

Q. You haven't paid any part or portion of this judgment that——

Mr. McGee: That is so stipulated.

Mr. Gallagher: So stipulated.

Q. (By Mr. Gallagher): When you got your private pilot's certificate did the government agency pick up the student's permit that you therefore had? A. Yes, sir.

Q. Then you went on and later got a commercial pilot's certificate? A. Yes, sir.

Q. The Government picked up your private pilot's certificate and rating?

A. That is right.

Mr. Gallagher: Take the witness.

Cross-Examination

By Mr. McGee:

Q. Mr. Brown, at the time of this accident you had been attending Mr. Phipps' flying school for about how long?

A. Oh, around four months, roughly; I don't remember.

Q. You had been taking training there with reference to obtaining your commercial pilot's license for about how long before this accident happened?

A. How long? [16]

Q. Yes.

A. About the same length of time.

(Testimony of Philip R. Brown.)

Q. Do you recall about how many more hours you had to do in order to obtain—strike that.

Do you recall how many more hours you had to do before you would be permitted to take the examination for the commercial pilot's license?

A. Well, I think it was about 20 hours, 20 or 25.

Q. Did you continue attending Mr. Phipps' school after this accident happened?

A. Yes, sir.

Q. During the time that you continued attending the school, after the accident happened, you were in training for obtaining your commercial pilot's license? A. That is right.

Q. When did you finally obtain it?

A. I don't know. It is in my log book.

Q. Do you have your log book with you?

A. Yes, it is over there (indicating).

The Court: You may step down and get it.

The Witness: Yes, sir.

Q. (By Mr. McGee): You have your log book in your hands, do you, Mr. Brown?

A. Yes, sir.

Q. That has been kept by you, has it, in the course of [17] your experience as a pilot?

A. Part of it. The solo time I fill in myself, and the dual the instructor fills in.

Q. Does that refresh your recollection as to when you obtained your commercial pilot's license?

Maybe it would refresh your recollection if I suggested to you it was in May of 1949.

A. I believe it was 6-4-49.

(Testimony of Philip R. Brown.)

Q. Beg pardon?

A. Sixth month, fourth day, and '49.

Q. That was in June of 1949. When you said you had 20 more hours at the time of the accident, you had 20 more hours to do before you could take your examination for a commercial pilot's license, you meant 20 more hours of flight time, didn't you?

A. Yes, sir.

Q. In addition to the flight time you had to do yet, you also had to complete various courses in the theory of aviation, did you not?

A. Yes, sir.

Q. On the day of the accident were you told by one of the instructors in the school what to do on the flight that you were accomplishing at that time, at the time of the accident? A. Yes, sir. [18]

Q. Had he instructed you what maneuvers you were to go through in the plane on that flight?

A. That is right, yes, sir.

Q. Did he designate the area within which your flight was to be accomplished? A. Yes, sir.

Q. Did he designate the length of time that the flight was to consume?

A. Well, roughly—it wasn't——

Q. What particular air maneuvers were you making at the time the accident happened?

A. 180-degree turn.

Q. Had the instructor told you before you went up on that flight that you were to do sequence turns? A. Yes, sir.

(Testimony of Philip R. Brown.)

Q. Was this 180-degree turn a part of sequence turns? A. Yes, sir.

Q. The flying that you were doing at the time of this accident was in preparation for your examination for a commercial pilot's license?

A. Yes, sir.

Q. Did you do anything on this flight which you were accomplishing at the time of the accident? Did you do any flying except such flying as you had been told to do by the instructor in the [19] school? A. No, sir.

Q. During your course of training at Mr. Phipps' school, looking toward your commercial pilot's license, did you do a series of landings from specified altitudes? A. Yes, sir.

Q. Did you do spirals? A. Yes, sir.

Q. From specified altitudes and in specified manners? A. Yes, sir.

Q. Did you do pylon figure 8's in a specified manner and at specified heights? A. Yes, sir.

Q. Did you do two-turn spins under the directions of the instructor? A. Yes, sir.

Q. Did you do straight climbs?

A. Yes, sir.

Q. Did you do slips? A. Yes, sir.

Q. Did you do maneuvers at minimum controllable speeds? A. Yes, sir.

Q. Did you do emergency maneuvers, such as simulated forced landings? A. Yes, sir.

Q. Did you do recovery from stalls entered from both [20] level and steeply banked altitudes?

(Testimony of Philip R. Brown.)

A. Yes, sir.

Q. During this course of training for your commercial pilot's license, did you also take glider flights? A. No, sir.

Q. Mr. Gallagher has referred to a student pilot's certificate or permit. You obtained that, did you not, sir, before you obtained your private pilot's license? A. Yes, sir.

Q. You obtained your student pilot's certificate or permit before you had taken any actual training toward a private pilot's license, did you not?

A. I had ground school first.

Q. You had ground school work?

A. Before I did any flying, why, we had——

Q. Before you did any flying you got the student pilot's certificate, is that right?

A. Yes, sir.

Q. And you got that before you did any flying but after you had had ground school work?

A. Yes.

Q. That was issued to you after you had taken a certain physical examination, isn't that right?

A. Yes, sir.

Q. During your course of training for the commercial [21] pilot's license you took cross-country runs, did you not? A. Yes, sir.

Q. Now, some of the hours you put in in flight, while you were training for your commercial pilot's license, were solo and some were dual?

A. That is right.

(Testimony of Philip R. Brown.)

Q. Of course, by "solo" we mean flying when no one was with you. A. Yes, sir.

Q. And by "dual" we mean flying when there was an instructor physically in the plane.

A. That is right.

Q. But in all the flying you did you were told what you should do and how to do it by an instructor in the school? A. Yes, sir.

Q. Now, during your course of training for the commercial pilot's certificate you, yourself, would sign certain reports that Mr. Phipps would make up or have made up to be sent to the Government, wouldn't you? A. Yes, sir.

Q. Some of those reports pertained to the number of flight hours you had had and the type of plane you had used? A. That is right.

Q. You didn't yourself have anything to do with preparing any charges that Mr. Phipps might make for the use of a [22] plane by you, did you?

A. No, sir.

Q. But you would sign reports made by him as to the number of hours you had flown in a certain type of plane? A. Yes, sir.

Mr. McGee: No further questions.

The Court: Were you doing anything in particular at the time this accident occurred, any special type of maneuvering, or anything?

The Witness: I was doing a series of turns.

The Court: A series of turns?

The Witness: Yes, sir.

(Testimony of Philip R. Brown.)

Mr. McGee: I didn't catch that answer. May I have it repeated?

The Court: He said he was doing a series of turns.

Do you have any redirect examination, Mr. Gallagher?

Mr. Gallagher: Yes, your Honor.

Redirect Examination

By Mr. Gallagher:

Q. Mr. Brown, just before the accident happened did you say you were engaged in a 180-degree turn? A. Yes, sir.

Q. When you started that turn were you traveling generally toward the east?

A. Well—— [23]

Mr. Gallagher: I will withdraw the question.

Q. (By Mr. Gallagher): Mr. Brown, were you doing anything that day that you hadn't learned how to do before you got your private pilot's license? A. No, sir.

Q. Were you alone in the airplane?

A. Yes, sir.

Q. You said you had to build up how many more hours of time before you could take the flight test to qualify as a commercial pilot?

A. I think it was around 20, 25 hours; somewhere around in there.

Q. Was this flying you were doing on this par-

(Testimony of Philip R. Brown.)

ticular day, December 5, 1948, solo time which was credited to your total time? A. Yes, sir.

Q. This flying that you were doing on December 5, 1948, occurred in Los Angeles County, California? A. Yes, sir.

Q. I think I have asked you, but I want to make sure. Immediately before you got your private pilot's certificate had you learned how to do, and did you take a test demonstrating your ability to do all the flight maneuvers required by the Civil Aeronautics Authority for the issuance of a private pilot's license for single-engine land airplanes? [24]

A. Yes, sir.

Mr. Gallagher: That is all.

Mr. McGee: Your Honor, may I ask several more questions on cross-examination?

The Court: That is all right.

Recross-Examination

By Mr. McGee:

Q. Mr. Brown, you took off from what airport?

A. San Fernando Airport.

Q. About how far were you from the airport where you took off, at the time the accident happened? A. About seven or eight miles.

Q. During the course of training for a commercial pilot's license did you operate any dual-motor planes? A. No, sir.

(Testimony of Philip R. Brown.)

Mr. McGee: That is all.

Mr. Gallagher: That is all.

The Court: Is there anything further from this witness?

Mr. Gallagher: No, your Honor.

The Court: Step down.

(Witness excused.)

The Court: We will take a short recess.

(Short recess taken.)

The Court: Call your next witness.

Mr. Gallagher: If your Honor please, in order to [25] clarify something that my associate thinks might not be clear, Mr. McGee and I are willing to stipulate that the particular airplane being used by Mr. Brown on the day of the accident was an airplane referred to and covered by the Schedule A attached to the policy.

Mr. McGee: There is no question about that. That is stipulated. It is not a stipulation as to any coverage pertaining to Mr. Brown.

Mr. Gallagher: No.

The Court: Merely as to the instrumentality?

Mr. McGee: Instrumentality, yes, sir.

DWIGHT F. PETERSEN

called as a witness by and on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Dwight F. Petersen.

(Testimony of Dwight F. Petersen.)

Direct Examination

By Mr. Gallagher:

Q. Mr. Petersen, where do you live?

A. Los Angeles, California.

Q. What is your occupation?

A. Flight operations inspector, Civil Aeronautics Administration.

Q. That is an agency of the Federal Government? A. Yes, sir. [26]

Q. Does that agency have to do with issuing licenses or certificates to pilots? A. Yes, sir.

Mr. McGee: Mr. Gallagher, if the purpose of this is to introduce into evidence any pertinent C.A.A. regulations, I will stipulate the proper foundation has been laid.

Mr. Gallagher: I merely wanted to introduce the form which was in use during the time Mr. Brown was the holder of a student pilot's certificate, of that particular type of certificate, so his Honor will be able to look at it.

The Court: All right.

Q. (By Mr. Gallagher): Do you have in your possession the form that was used by the Civil Aeronautics Administration with reference to student pilot certificates from May of 1947 up to and through June of 1948? A. Yes, I do.

Mr. Gallagher: May I step up and get it, your Honor?

The Court: Yes.

Q. (By Mr. Gallagher): Mr. Petersen, is it

(Testimony of Dwight F. Petersen.)

usually indicated on a student pilot's certificate that —I withdraw that.

Is there any limitation with reference to the type of aircraft which may be used by the student pilot in obtaining his original instruction? By that I mean, is there any limitation when a person starts out? Could you, if you wanted to, [27] take instructions in a four-engine airplane so long as you were under the control of a qualified and certificated instructor? A. That is correct.

Q. The limitations with reference to the type of aircraft and the number of engines come into play when you get your first airman's certificate with your ratings, is that correct?

A. Not exactly. Limitations, so far as the student is concerned, might be imposed by the instructor when he permitted the student to solo.

Mr. McGee: May I ask that be repeated? I couldn't hear it.

The Court: Raise your voice.

The Witness: Not exactly, because a student pilot would be authorized to solo specific types of aircraft, according to what the instructor deemed him competent in. That is provided for by endorsement on the reverse side of the certificate.

The Court: You may impose additional limitations than what appear on the application?

The Witness: Yes. That is determined on what the instructor finds the student competent to do.

Q. (By Mr. Gallagher): That has reference to

(Testimony of Dwight F. Petersen.)

what a person may do under a student pilot's certificate? [28] A. That is correct.

Mr. Gallagher: I would like to offer this form in evidence, your Honor, as Plaintiffs' Exhibit No. 1.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit No. 1 in evidence.

(The document referred to was marked Plaintiffs' Exhibit No. 1 and received in evidence.)

Q. (By Mr. Gallagher): Do you know the part of the Civil Air Regulations which, in 1948, pertained in various pilot ratings?

Mr. Gallagher: I will withdraw that.

Q. (By Mr. Gallagher): On December 5, 1948, what parts of the Civil Air Regulations referred to student pilot's, private pilot's, and commercial pilot's certificates?

A. Part 20 of the Civil Air Regulations pertains to the requirements for issuance or obtaining the student pilot, private pilot, and commercial pilot ratings. Part 43 pertains to general operation rules, which include privileges and limitations of those certificates.

Q. In other words, Part 43 contains the federal regulations on limitations applicable to the holder of a particular type of pilot's certificate or rating?

A. Student, private, and commercial.

Mr. Gallagher: That is all. [29]

(Testimony of Dwight F. Petersen.)

Cross-Examination

By Mr. McGee:

Q. Mr. Petersen, would the holder of a private pilot's license be limited to a certain type of airplane, let us say a single-engine airplane?

A. Yes, sir, if that is the type of aircraft in which the examination was obtained and he had no further examination.

Mr. McGee: That is all.

The Court: Let me ask you this: That student's permit is issued to whom?

The Witness: To the applicant or the student pilot who applies for it.

The Court: Now, when a person has one type of license, such as, for instance, a license for one type of aircraft, and desires to pursue further studies that will give him a broader field of knowledge, is he given a license of this type?

The Witness: Upon acquiring a rating covering the other type of aircraft or the other category, you might say, he would take an examination in that category and the rating would be applied to the same certificate be held.

The Court: What was the technical name of the license Mr. Brown had?

Mr. Gallagher: He had an airman's certificate and a [30] private pilot's rating, single-engine land airplane.

The Court: And he was seeking a commercial license?

(Testimony of Dwight F. Petersen.)

Mr. Gallagher: Yes, he wanted a commercial pilot's rating.

The Court: All right. Now, would a person in that position, seeking instructions, need a student's certificate?

The Witness: No, sir. He might be a person with a private pilot's certificate seeking a commercial rating, which is a higher rating than private pilot.

The Court: In other words, the type of certificate that he has would allow him, without anything further, to pursue all the experimentation and study with his own or any other plane that he might hire in order to perfect himself, is not that true?

The Witness: That is correct.

The Court: As in maritime law, it is as though an ablebodied seaman wanted a higher rating, and he would have to pass an examination. Are you familiar at all with that?

The Witness: No, I am not.

The Court: Then that does not do me any good. It is argumentative, anyway.

These student permits, which allow the student and allow any person that owns an airplane to be given instructions, and allows him to use an airplane for that purpose, it is limited to a person who has no form of certificate at all, is [31] that true?

The Witness: I think you mean——

(Testimony of Dwight F. Petersen.)

Mr. Gallagher: Speak a little louder, if possible.

The Witness: I think you mean a man must have a certificate in order to operate aircraft. A student's certificate in that sense would apply to a novice, a person who had not previously held a certificate.

The Court: That is the point I wanted to bring out.

Mr. Gallagher: Would your Honor permit me to have that answer read, the part where the witness mentioned a novice?

The Court: Yes.

(The witness' answer was read.)

Redirect Examination

By Mr. Gallagher:

Q. When the novice who holds a student's certificate, student pilot's certificate, attains a sufficient degree of proficiency to pass the flight examination and is issued a private pilot's certificate and rating, does the Government pick up the student's permit?

A. Yes, sir, we do. A pilot cannot hold two pilot's certificates.

Mr. Gallagher: Thank you, Mr. Petersen.

Recross-Examination

By Mr. McGee:

Q. Your answer to one of Mr. Gallagher's ques-

(Testimony of Dwight F. Petersen.)

tions, I [32] believe, was that a pilot may not hold two certificates at the same time.

A. May not hold two pilot's certificates. He may hold many pilot ratings, but not two airman's certificates of pilot classifications.

Q. The term "airman's certificate" has been referred to. Mr. Petersen, just what is an airman's certificate?

A. An airman's certificate would be a certificate issued to a qualified individual for various types of airman ratings, which would include mechanics, dispatchers, control tower operators, parachute riggers, or technicians, and pilots, also. We classify all those certificates in the general term "airman certificates."

Q. Is there such a thing as a separate airman's certificate, that is, is there an airman's certificate that is separate and apart from a pilot's certificate?

A. Yes, sir. A mechanic's certificate would be an airman's certificate.

Q. Well, now, a person who has a private pilot's license, does he also have an airman's certificate?

A. A person cannot hold a private pilot's license in the sense of a license. We issue a certificate which states on it, "Airman's Certificate." The rating is private pilot. "Private pilot" is the rating, private pilot rating.

Q. Where does the airman's certificate come in with [33] respect to one who has a private pilot's rating?

(Testimony of Dwight F. Petersen.)

A. The certificate itself is an airman's certificate. The pilot rating is private pilot.

Q. How about a student, one who has the rating of a student pilot, does the airman's certificate relate to him, also?

A. The student pilot certificate is also an airman's certificate.

Mr. McGee: Thank you.

Mr. Gallagher: That is all.

The Court: Step down.

(Witness excused.)

The Court: Ordinarily, I do not look at the clock, but this is the first day of the trial, and I am more generous on the first day. We have ample time so I will not need to crowd you. I will surprise you by adjourning on time.

Mr. Gallagher: May I ask your Honor to remain in session for just one minute? The Veterans Administration is here, and they have the contract, and they want to go away.

The Court: We will charge that time up to you, then.

Mr. Gallagher: Yes, you may charge it up to me.

The Court: Any representative of any administrative body we will hear and let go.

Mr. Gallagher: Mr. Pellerin, please. [34]

MAXWELL G. PELLERIN

called as a witness by and on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Maxwell G. Pellerin.

Direct Examination

By Mr. Gallagher:

Q. What is your residence?

A. 3261 California Street, Huntington Park.

Q. What is your occupation?

A. Contract officer.

Q. With the Veterans Administration?

A. With the Veterans Administration.

Q. Do you have the contract which was in existence between Mr. Phipps and the Veterans Administration in the year 1948, and particularly on December 5, 1948? A. Yes.

Q. Will you produce it, please?

A. Yes. That covers the period July 1, 1948, to June 30, 1949.

Q. Is this entire document that particular contract (indicating)? A. No.

Q. How much of it is the contract?

A. This portion. This is the portion of the contract [35] (indicating).

Q. This is the contract in effect between July 1, 1948, and June 30, 1949?

A. Yes, sir, that is correct.

Q. With Phipps Flying Service out in San Fer-

(Testimony of Maxwell G. Pellerin.)

nando? A. Yes, sir.

Mr. Gallagher: Will you stipulate that it is the Mr. Phipps that we have referred to?

Mr. McGee: Oh, yes.

Mr. Gallagher: I will offer this contract in evidence, your Honor.

The Court: We cannot take it away from him. You should have had them prepare a photostatic copy. We can have him leave it and then you can supply a photostat, unless you have a copy of it.

Mr. McGee: I think we can solve the difficulty this way: I understand that this contract is precisely the same as the contract that was in effect for the previous year, a copy of which I have.

The Court: Well, if you can stipulate to that.

Mr. McGee: Can we stipulate to that?

The Court: I do not like to take the Veterans Administration papers away from them.

Mr. Gallagher: That is right, your Honor.

Q. (By Mr. Gallagher): Is it your understanding that [36] the contract in effect between July 1, 1948, and June 30, 1949, was the same in all respects as the contract in effect from July 1, 1947, to June 30, 1948, between the Veterans Administration and the Phipps Flying Service?

A. I cannot testify to it being exactly; essentially it is.

Q. Essentially the same? A. Yes.

The Court: You enter into these contracts with these schools every year?

The Witness: That is right.

The Court: Unless there is some special——

(Testimony of Maxwell G. Pellerin.)

The Witness: Minor changes.

The Court: ——situation that arises, the conditions are the same?

The Witness: Yes.

The Court: Or the character of the school changes.

The Witness: Yes.

Mr. Gallagher: We will accept that.

The Court: We can receive that subject to any modification you may make, should you discover any change before the case is concluded.

Mr. Gallagher: Very well, your Honor.

Mr. McGee: Since Mr. Phipps still has some use for that, I understand, may it be stipulated that it may be withdrawn [37] upon the substitution of a proper copy?

The Court: A photostatic copy.

Mr. McGee: Photostatic copy.

Mr. Gallagher: So stipulated.

We will offer that as Plaintiffs' Exhibit No. 2.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit No. 2 in evidence.

(The document referred to was marked Plaintiffs' Exhibit No. 2 and received in evidence.)

The Court: Is there anything further from this witness?

Mr. Gallagher: Nothing, your Honor.

The Court: Mr. McGee?

(Testimony of Maxwell G. Pellerin.)

Mr. McGee: No, sir.

The Court: All right, sir. Step down.

(Witness excused.)

The Court: We will take our regular adjournment to 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, an adjournment was taken until 2:00 p.m. of the same day.) [38]

Tuesday, December 5, 1950—2:15 P.M.

Mr. Gallagher: Mr. Stephenson.

GLENDON E. STEPHENSON

called as a witness by and on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Glendon E. Stephenson.

Direct Examination

By Mr. Gallagher:

Q. Mr. Stephenson, where do you reside?

A. 12420 Milbank Street, North Hollywood, California.

Q. What is your occupation?

A. Underwriter.

Q. For The Ohio Casualty Insurance Company?

A. That is correct.

Mr. Gallagher: Mr. McGee, instead of showing the witness the copy of the policy which is attached to the answer, may I, with your permission, exhibit

(Testimony of Glendon E. Stephenson.)

a photostatic copy of the policy, just for a couple of questions to him?

Mr. McGee: Certainly.

Q. (By Mr. Gallagher): Mr. Stephenson, I will show you a duplicate or a photostatic copy of the portions of the policy attached to the answer of The Ohio Casualty Company in this litigation, and ask you whether that policy, insofar [39] as the printed form portion of the policy is concerned, is one that was in general use by The Ohio Casualty Insurance Company throughout the United States at the time.

A. You mean for the aviation policy?

Q. Yes.

A. I could not answer that because I have never underwritten an aviation policy in my life.

Q. Then you don't know anything about it, do you? A. Nothing.

Mr. Gallagher: I want to tell your Honor I haven't had a chance to talk to this man. I had him subpoenaed as an underwriter. I thought he would know the answer to that question. It isn't too important.

That is all.

The Court: All right.

(Witness excused.)

Mr. Gallagher: If your Honor please, you said something this morning that has disturbed me somewhat over the noon hour.

The Court: Are not you used to me now? I

told you never to take a vested interest in anything I say.

Mr. Gallagher: That is right, your Honor.

The Court: Remember that many times I talk one way and decide a case another way.

Mr. Gallagher: I am not disturbed by anything your [40] Honor said with reference to tentative views, with reference to the issues.

The Court: What is disturbing you?

Mr. Gallagher: It was your Honor's reference to the Federal Register. I, frankly, have not attempted to correlate the provisions and sections in the Code of Federal Regulations with the Federal Register itself, because in 44 U. S. Code Annotated, Sections 307 and 311 (c), as I read those sections, the court takes judicial notice, not only of the Federal Register, but the Code of Federal Regulations as published by the Director of Archives——

The Court: We have them here. I meant to include both. I merely am saying, if there are regulations which have the force of law but which are not published, then you have to give me a copy. I have the complete list. There are 50 volumes of old ones.

Mr. Gallagher: That was all I wanted to clear up.

The Court: We have them all.

Mr. Gallagher: Thank you.

The Court: All I want to do is point to the fact that regulations of a type that have not yet appeared or of a type that they can make without publication, I have to have copies of.

Mr. Gallagher: Yes, your Honor.

The Court: We have the complete [41] regulations.

Mr. Gallagher: I would like to ask Mr. Brown one further question which I think was omitted, if your Honor will permit me to do it.

The Court: Yes.

Mr. Gallagher: Come forward, Mr. Brown.

PHILIP R. BROWN

recalled as a witness by and on behalf of the plaintiffs, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Gallagher:

Q. Mr. Brown, as of December 5, 1948, approximately how many solo hours had you logged in single-engine aircraft? A. Around a hundred.

Q. What did you say?

A. Around a hundred.

Q. Around a hundred? A. Yes.

Q. That 100 hours of logged time was after you had been certificated and qualified as a private pilot, is that correct?

A. No, that includes——

Q. The hundred hours? A. Yes, sir.

Q. Well, have you your log book? [42]

A. Yes, sir.

Q. Will you take a look at your log book and

(Testimony of Philip R. Brown.)

tell us how many solo hours you had on December 5, 1948?

A. Well, you see, I have two log books. One is—you want the total time?

Q. Yes, the total time.

Mr. Gallagher: I will withdraw that question.

Q. (By Mr. Gallagher): Do you have a log book of your time only as a private pilot after you obtained your certificate, up to that time?

A. No. I have a log book with only the time in certified school. And the other log book I have is my total time that I do flying on my own, outside the school, or any flying at all.

Q. Well, do you have any log book that shows all of your total solo hours up to December 5, 1948?

A. Well, I can figure it out. Just a minute. 92 hours solo.

Q. Does the 92 hours of solo time include your time in airplanes that you personally rented?

A. Yes, sir.

Q. That is, up to December 5, 1948?

A. Yes, sir.

Mr. Gallagher: That is all.

Mr. McGee: No objections. [43]

The Court: Step down.

(Witness excused.)

Mr. Gallagher: Mr. Phipps.

HARRY D. PHIPPS

called as a witness by and on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Harry D. Phipps.

Direct Examination

By Mr. Gallagher:

Q. Mr. Phipps, I hand you Plaintiffs' Exhibit No. 2, which is a contract between the Veterans Administration and Phipps Flying Service effective between July 1, 1947, and June 30, 1948, and attached to that are a group of typewritten and mimeographed pages.

Is it true that for the period from July 1, 1948, to the period ending June 30, 1949, you had exactly the same type of contract with the same provisions in it, excepting for the changes of dates, and that the contract in effect on December 5, 1948, included the same addenda which are attached to this particular contract? A. That is true.

Q. So all you got for the 1948 period was a new basic contract containing the same memoranda or conditions attached to it? [44]

A. That is correct.

Q. Thank you. You furnished the particular airplane which was being piloted by Mr. Brown on December 5, 1948, to him, pursuant to the provisions of that contract with the Government, is that true? A. I did.

(Testimony of Harry D. Phipps.)

Mr. Gallagher: That is all.

The Court: Do you have any cross-examination, Mr. McGee?

Mr. McGee: Your Honor, I am afraid this might be going outside the scope——

The Court: Let us not do it. I believe in the rules of evidence.

Mr. McGee: I will reserve it.

The Court: He was merely asked about any changes in the contract. You can put him on as part of your case later on.

Step down.

(Witness excused.)

Mr. Gallagher: The plaintiffs rest.

Mr. McGee: Mr. Phipps, will you take the stand again, please?

HARRY D. PHIPPS

recalled as a witness by and on behalf of the defendant, and having been previously duly sworn, was examined and testified as follows: [45]

Direct Examination

By Mr. McGee:

Q. Mr. Phipps, at the time of the accident involved in this case, Philip R. Brown was engaged in a course of instruction at your flying school, was he not? A. That is correct.

(Testimony of Harry D. Phipps.)

Q. He was taking that course of instruction pursuant to the GI Bill of Rights?

A. That is right.

Q. Were the courses of instruction given in your school at that time, including the one which was being taken by Philip Brown, under the direction of instructors? A. That is correct.

Q. Were all of the flights taken by the students, whether it was a student for a private pilot's license or a student for a commercial license, under the supervision of instructors in your school?

A. They were.

Q. Before a student—and I am speaking about a student such as Philip Ray Brown—undertook any particular flight, was he told by an instructor in your school what he should do on that flight and the area in which the flight should be taken?

Mr. Gallagher: That is objected to, your Honor, upon the ground it calls for a conclusion of the witness. [46]

The Court: I think it is rather leading.

Mr. Gallagher: I don't mind that.

The Court: Mr. McGee, I think the court should be given the facts on which to determine the amount of direction the student had, rather than asking leading questions that can be answered by conclusions.

Q. (By Mr. McGee): Mr. Phipps, will you describe the procedure that was followed in your school with respect to a student such as Philip Ray Brown, as to the instruction given him, the

(Testimony of Harry D. Phipps.)

supervision, if any, exercised over him, in connection with flights that he would take in connection with his course of training?

A. At the start the students would be assigned to a definite instructor. The instructor had his curriculum to follow in which he would state to students what he had to work on.

At each flight the student was directed by that particular instructor as to what to work on and where to work, and, as a rule, how long he should stay on it.

Q. Did those instructors that you have referred to have a pilot instructor's rating, issued by the C.A.A.? A. They did.

Q. Will you describe to the court, Mr. Phipps, the basis upon which you were paid by the Government for the use of airplanes by students, in connection with the flights or [47] flight training?

Mr. Gallagher: That is objected to, your Honor, upon the ground the contract would be the best evidence, and only evidence of that. There couldn't have been an oral agreement with the Veterans Administration. It would have to be in writing.

Mr. McGee: If the court would refer to page No. 2—I have the contract. I should hand it up to your Honor. I believe that it may appear that some explanatory words are necessary.

The Court: Paragraph C, "Cost of Instruction," is that it?

Mr. McGee: Yes, sir. And then there are paragraphs relating to dual hours of flight and solo

(Testimony of Harry D. Phipps.)

hours, and type of—May I state what I propose to show?

The Court: Go ahead.

Mr. McGee: This is what I propose to show by this line of questioning, your Honor: that is, that he was paid upon an hourly basis by the Government for the use of planes by the students in connection with the course of training. And that the amount that was paid varied according to the type of plane that was being used.

The Court: Unless there is some ambiguity here, the explanation would be a modification. We take judicial notice of the fact that for a dual flight a different plane would be [48] available than for a solo flight.

Mr. McGee: I don't think it is altogether clear from the contract.

The Court: If you mean to say what kind of plane was used in one or the other, I think that would be permissible, but not to try to apportion the money. Any attempt to apportion the money would not be a modification of this instrument.

Mr. McGee: Of course, your Honor, the instrument is here as a collateral matter.

The Court: I know what you are trying to do. You are trying to bring yourself within the theory this was a hiring.

Mr. McGee: That is right.

The Court: I am willing to let you get in all the facts that are permissible, before I decide it is a hiring. I am not very much impressed by the

(Testimony of Harry D. Phipps.)

argument. I do not think you can turn an agreement for instructions, using a plane, into a contract for hire, any more than you could turn a contract by these driving schools into one of hiring an automobile. I have taken one of those driving courses. It is so much per hour. That is a matter to be argued later on, though.

All I am saying is that you may ask a question as to which plane was used on a dual flight, what type of plane, and what type of plane was used on a solo flight. To that extent I will allow you to explain it. But not to show any apportionment of the money. [49]

Mr. McGee: This is what I had in mind—I don't want to transgress on the ruling of the court——

The Court: I am not making any ruling. I am telling you what I think you can explain.

This is a very explicit contract. It describes the hours and the conditions. It has all sorts of specifications. So for the present let us go on with that question, and then we will talk about others. This contract even describes the books and the maximum and minimum of the instructions for which they were paid, and the supplies.

Q. (By Mr. McGee:) In the course of training of students taking the course that Mr. Brown was taking, were different types of planes used?

A. They were.

Mr. McGee: Your Honor, this isn't what is clear to me: whether it appears from the contract that the amount that was paid to Mr. Phipps by the Govern-

(Testimony of Harry D. Phipps.)

ment varied according to the different types of planes that were used.

The Court: Mr. Phipps, tell us what was used on the solo flight. What type of plane did you use on a solo flight?

The Witness: We used a 65-horsepower ship, or they could use 155 or better. That was listed.

The Court: What about the dual?

The Witness: The same.

The Court: The same? [50]

The Witness: That is right.

Q. (By Mr. McGee): Then where did the difference in the planes come in?

A. Just in the quantity that we had. There might be some particular ship that some instructor wanted to use particularly because it might have been, the engine might have been a little better, in a little better condition, so he could get a little better performance.

There was no particular distinction between the aircraft in any of my schools, as to which, as to whether they should be used for dual or solo.

Q. Did the charges made by the Government vary according to the type of craft that was used?

Mr. Gallagher: Just a moment. I don't think you meant that. "Charges made by the Government"?

Q. (By Mr. McGee): By you to the Government. Did the charges vary according to the type of plane used?

A. That was broken into this classification: We had, for 65-horsepower aircraft we had one charge

(Testimony of Harry D. Phipps.)

for solo flight time. We had another charge for dual flight time.

Then in the horsepower range such as the Stinson Mr. Brown was involved in, that was another price. It was broken down into dual or solo.

The Court: In other words, you would call it dual or solo depending upon the type of plane used? [51]

The Witness: No, whether or not an instructor was with the student. By "solo" he would be alone in the airplane.

The Court: Yes, I know. But I do not get the purport of your last answer.

The Witness: On the dual flight——

The Court: This contract says that dual flight is $10.86 per hour and solo is $7.86 per hour, and then gives a total, or maximum. How did the type of plane enter into either of these classifications, as to the price set forth in the contract?

The Witness: There are two types of planes used. One is larger than the other, and therefore we got more money for that particular aircraft. It was more expensive and cost more to operate.

The Court: How would you bring it under this schedule?

The Witness: The Civil Aeronautics Authority stipulates how many hours in each type of aircraft a student must have in order to qualify for a particular license, and we were staying within their limitations, when that contract was written. So many hours had to be flown in aircraft of certain

(Testimony of Harry D. Phipps.)

horsepower, and so many more in aircraft of heavier horsepower.

The Court: Heavier?

The Witness: And we got more money.

The Court: You charged for dual instead of solo? [52]

The Witness: No.

The Court: I still do not get that.

Mr. Gallagher: May I explain that to your Honor?

The Court: Explain it in simple language.

Mr. Gallagher: Assume, your Honor, you want to take flying lessons and I am an instructor, and you come to me and you and I get into an airplane together. We go up, the two of us, in the airplane. I show you how to manipulate the rudder and the stick. That is called dual, when the instructor and student are together in the airplane. It doesn't make any difference what kind of an airplane it is.

On solo, you are all alone, by yourself.

The Court: I understand that.

The Witness: That would be the difference in the rate.

The Court: What I am trying to find out is, how does the size of the plane affect this rate here, which is based solely upon whether it is single or dual?

Mr. Gallagher: There may be other provisions there where the rate for dual on a 65-horsepower airplane, and solo on such airplane——

(Testimony of Harry D. Phipps.)

Mr. McGee: May I ask these questions? I think they may shed some light on this.

The Court: Go ahead.

Q. (By Mr. McGee): In taking solo flights, would a student taking the kind of course Mr. Brown was use different [53] types of planes or planes of different horsepower? A. He would.

Q. You would make varying charges to the Government, depending upon what the horsepower of the plane was that was being used by the students on the solo flights? A. Yes, sir.

Q. Is that correct, sir? A. That is correct.

Q. In the taking of dual flights, which is when, as I understand it, not only the student is present but a flight instructor also, and in the taking of those flights sometimes a plane of a certain horsepower would be used and sometimes a plane of a different horsepower? A. That is correct.

Q. You would bill the Government, and you would make different charges to the Government, depending upon which type of plane was used—I mean, what the horsepower of the plane was?

A. That is correct.

Q. Now, was the Government billed by you for the flight which Mr. Brown was taking at the time of his accident?

Mr. Gallagher: That is objected to, if your Honor please. If counsel intends to intimate the Government was billed for each separate time an airplane was taken out, and counsel wants to ask the witness if at the end of the month [54] they

(Testimony of Harry D. Phipps.)

sent the Government a statement showing the number of hours all the airplanes were used and their total charges, I would have no objection to it.

The Court: I will overrule the objection. I presume each flight was taken into consideration and it was taken in as part of the monthly billing.

Mr. McGee: Perhaps I can make it simpler by asking this question:

Q. (By Mr. McGee): Did Mr. Brown make any flights while he was attending your school for which you didn't bill the Government?

A. He did.

Q. By that do you mean flights he took when he himself rented and paid for the plane?

A. That is correct.

The Court: The particular flight in which this unfortunate accident occurred was a flight for which the Government was billed, for that month?

The Witness: That is correct.

The Court: Is that what you wanted, Mr. McGee?

Mr. McGee: Yes, sir.

Q. (By Mr. McGee): You billed the Government for the course Mr. Brown took, in accordance with the contract which has been introduced in evidence here? A. We did. [55]

Q. The course of training which Mr. Brown was taking was divided substantially into two parts, that is, the ground instruction and the flight instruction?

A. They had to be given simultaneously.

Q. Will you explain what you mean by that?

(Testimony of Harry D. Phipps.)

A. Well, a student could not take just the flight portion of that training. He had to have the ground instructions as well as the flight instructions, in order to qualify for the license and in order for us to qualify to bill for that particular student.

Q. You billed the Government for the instruction which Mr. Brown had, both ground instruction and flight instruction, in accordance with the contract that has been introduced here? A. We did.

Q. Now, did the ground instruction involve the use of an airplane? Let me get at it this way: By "flight instruction" you mean instruction in the actual flying of a plane aloft, is that right?

A. That is correct.

Q. By "ground instruction" you mean instructing the students in the fundamentals of aviation?

A. That is right. Such as navigation, meteorology, general service of aircraft, a little bit of radio.

Q. That is what is meant by "ground instruction"? A. That is correct. [56]

Mr. McGee: I have no further questions.

Cross-Examination

By Mr. Gallagher:

Q. Mr. Phipps, in your operations out there you rented airplanes to private pilots and commercial pilots on many occasions, didn't you?

A. That is correct.

Q. If a man walked into your place and he exhibited to you a currently effective airman's cer-

(Testimony of Harry D. Phipps.)

tificate and a currently effective airman's rating record—the latter rating the individual as a private pilot of airplane, single-engine, land—and that individual should then want to rent and pilot one of your Stinson aircraft similar to the one Mr. Brown was flying on December 5, 1948, would you rent the aircraft to such pilot or such person, in the event he satisfied you that he could handle the airplane with reasonable safety?

A. We would. But that would have to be proven by a check-out, an actual flight check-out.

Q. In other words, if such a person came to you and wanted to rent an airplane, wanted to go up in it himself and pilot it himself, you would have one of your check pilots take a ride with him on a couple of take-offs and approaches and landings to see how he handled the airplane?

A. That is right.

Q. If you were satisfied that your property was safe [57] in his hands you would turn it over to him and he would then pilot this rented airplane, wouldn't he? A. That is right.

Q. And such pilot would make his own personal arrangements to rent the airplane, wouldn't he?

A. That is correct.

Q. He would pay you for it?

A. That is right.

Q. Such pilot, who was also the renter, would be the only person in the airplane while it was in the air? A. That is right.

Mr. Gallagher: That is all.

(Testimony of Harry D. Phipps.)

Mr. McGee: One or two more questions.

The Court: All right.

Redirect Examination

By Mr. McGee:

Q. Mr. Phipps, in billing the Government for courses, such as Mr. Brown was taking, would your billing show the number of hours that each student had flown a particular plane?

A. It would show the number of hours in a particular type of ship.

Q. Particular type of plane?

A. That is correct.

Q. Your billing would show the hourly records, the hourly record of the use of a particular type of plane by a [58] particular student?

A. It would.

Mr. McGee: I have no further questions.

Mr. Gallagher: No further questions, your Honor.

The Court: Step down.

(Witness excused.)

Mr. McGee: We rest, your Honor.

The Court: Do you have anything further, Mr. Gallagher? Do you have any rebuttal?

Mr. Gallagher: No, your Honor.

The Court: All right. I will hear any argument you want to present.

You have decided not to use the depositions?

Mr. Gallagher: Yes, your Honor. They are the depositions of Mr. Phipps and Mr. Brown.

The Court: That is all right. I just want to make sure.

Opening Argument on Behalf of the Plaintiffs

By Mr. Gallagher:

May it please your Honor, in this case the evidence, of course, is quite clear. The effect to be given that evidence is, of course, your Honor's sole province.

There are two issues in the case, as we agreed at the outset. One, was Mr. Philip Brown a student pilot? Two, was Mr. Philip Brown a renter pilot?

The Court: You can eliminate the second question. I [59] would rather hear what Mr. McGee has to say. You cannot segmentize a contract and split the amount of money that was being given for rental of the property from instructions. The contract does not speak of any specific sum for rental. The money is not divided in that manner.

The relationship is not that of a renter and an owner of an automobile, who rents at so much. The course of instructions covers ground instructions, and you could not split it, any more than you could, as I say, should I want to brush up on my driving, as I have not driven since an illness two or three years ago, and took the type of lessons I took years ago. I would hire a person, one of these driving instructors, and pay him so much per hour, which would include instructions and manipulating the automobile, watching my driving and

driving alongside me, or having me drive on a lot and watching me and ordering me to do certain particular things. But the sum I paid him would not be for the hiring of the automobile. I would pay him for the instructions, which included the use of the automobile.

I think the words in that contract contemplated a separate hiring which was dissociated entirely from an instruction setup. I would rather hear you on the other.

Mr. Gallagher: Very well. Taking up the problem No. 1, the policy provides that the "additional assured" clause shall not include any person who is a student pilot. [60]

Now, if we take a look at that contract of insurance we will notice that the insurance company itself recognizes and describes three separate and distinct types of pilots.

The Court: Where is the contract?

Mr. Gallagher: That is the one attached to the answer, the insurance contract. It is the photostat at the end of the answer.

The Court: Which page of it?

Mr. Gallagher: The first page, your Honor, at the bottom, where it says——

The Court: "Exclusions"?

Mr. Gallagher: No. May I show you? May I use your copy, Mr. McGee?

Mr. McGee: Yes.

Mr. Gallagher: Here is one that is separated. It is right down here, this part I am reading now, the first page (indicating).

The Court: All right.

Mr. Gallagher: Now, on this contract issued by the insurance company to Mr. Phipps, the insurance company says, "The aircraft will be operated only by the following pilots"—and then written in in typewriting is, "Any private or commercial certificated and qualified pilot also any student pilot while under the supervision of a commercial cerficated pilot having a pilot instructor's rating issued by the [61] C.A.A."

There we have references to classifications which are clearly shown in the Civil Air Regulations. One, the private certificated and qualified pilot. Two, the commercial certificated and qualified pilot. Third, the student pilot.

Now, in Part 20 of the Civil Air Regulations, which are codified in Title 14 of the Code of Federal Regulations, we have first the reference to student pilot certificates. Your Honor will notice that under the requirements for the issuance of such certificate there is no aeronautical knowledge of any kind required.

Next we have the private pilot certificates with ratings. In other words, a private pilot may be rated as qualified to fly a single-engine land airplane, a multi-engine land airplane, a seaplane or a flying boat, or all of them. But a student is not licensed to fly any airplane and carry passengers in it, for instance, or to exceed certain territorial limitations which I will call your Honor's attention to a little bit later.

The private pilot rating requires certain aeronau-

tical knowledge, aeronautical experience, and aeronautical skill.

Mr. Brown, according to the evidence in this case, had all of those qualifications which are requisite in order to entitle him to fly that Stinson aircraft anywhere in the United States and to carry passengers, so long as he did not [62] carry them for hire.

Now, under the law, as I understand it—and when I say "the law" I am talking about the Civil Aeronautics Act and the Civil Air Regulations—Mr. Brown was not a student pilot within the meaning of the Civil Air Regulations.

When the insurance company itself selects the very same pilot classifications which are set forth in the Civil Air Regulations, it is quite obvious that the insurance company referred to exactly the same type of classifications. Therefore, I respectfully suggest to your Honor that Mr. Brown was not a student pilot. He was a certificated and qualified private pilot and was flying this airplane as such.

It is exactly the same as a lawyer who is licensed to practice law, but who wants to obtain a degree as a doctor of jurisprudence. He goes back to school and takes a postgraduate course. He is not a student lawyer any more. He is not a student attorney, proctor, and so forth, in the federal courts. He is an attorney at law who may be studying, the same as your Honor suggested this morning. I am not using your Honor's example for the purpose of impressing the logic of the argument upon you,

but because it is one that I think fits the situation, that is, a physician who is duly licensed to practice medicine and who goes to school to further his education or to acquire further skill. He wouldn't be classified as a student physician and surgeon. He is [63] classified as a physician and surgeon.

In this case I respectfully submit to your Honor that Mr. Brown was not a student pilot. He was a private pilot. They recognize those distinctions themselves in their policy, and the policy says also, in the "additional insured" portion of it, "The term 'Insured' shall include not only the Named Insured but also any other person while riding in, or a pilot approved hereunder, while operating such aircraft, and any other person legally responsible, other than as pilot, for its operation, provided such operation is with the permission of the Named Insured, but shall not include: . . .

"(f) or any person who is a student or renter pilot."

The pilots who are approved in the typewritten portion of the first page, that I called your Honor's attention to, are "Any private or commercial certificated and qualified pilot . . ."

I respectfully submit for the plaintiffs.

The Court: All right.

Opening Argument on Behalf of the Defendant

By Mr. McGee:

Your Honor, to which phase of the issues do you desire I first direct my argument, sir?

The Court: It doesn't make any difference. You are free. I merely told Mr. Gallagher I was not im-

pressed very much by the second point. I will give you the opening on that. [64]

Mr. McGee: I will take the opening on that.

The Court: I am not limiting you gentlemen. You can take all the time you desire.

Mr. McGee: Our contention is that Mr. Brown, in operating the plane, was a bailee for hire, which, I am sure we have to recognize, means the same thing as renting. The words that are used in an insurance policy must be understood and must be taken in their plain and ordinary and proper sense.

The Court: That is correct. And most strongly against the company.

Mr. McGee: Most strongly against the insurer, that is correct.

The Court: I know what happened to me in the famous Boulter v. Commercial Standard Insurance Company case. That case is cited at 175 F. 2d 763. I tried to interpret the words of limitation as to the use of a trailer when commercially used in hauling merchandise.

The man in that case had taken his mother-in-law on a trip, and he said one reason he went back to San Francisco was to pay a premium on the policy, and while he was in San Francisco he thought of calling up a man and soliciting business, but he did not. I thought it was so farfetched that, even after the jury decided he was right, I set it aside. But the court held that every intendment is for coverage, and if he intended to use it toward that purpose, that that [65] was enough to cover it, despite the fact that the most valuable part of the

equipment, the six-wheel attachment, was left up in the north, and he was going back to San Francisco with just the chassis, on which he could carry almost nothing. He carried a few sacks.

I think when we start talking about these insurance policies we have to remember our higher courts say this language shall be interpreted most strongly against the insurer.

Mr. McGee: That is true, but the courts have also observed, as the California Supreme Court, in——

The Court: I am not bound by the California Supreme Court: That was my trouble in that case. I used every California case there was, and Judge Pope just disregarded them entirely. The cases that I use and refer chiefly to are federal cases.

I realize that an insurance contract is governed by state law, but, in interpreting this contract, we are in the domain of federal law, because we have to apply to it the nomenclature and the designations given by federal authorities to certain persons. That is why I am not bound by the interpretation of the state courts.

Mr. McGee: Your Honor, I mention the California case, as I was about to, as being one of the cases in line with the authorities throughout the country—federal decisions, as well as decisions of the state courts—the import of which [66] is that the words of an insurance policy should be used in their popular and ordinary meaning. And although ambiguities are to be resolved against the insurer, nevertheless the courts should not give a strained

or unnatural construction to something for the purpose of——

The Court: I agree with you on that.

Mr. McGee: A case that might be of some benefit to us here is 292——

The Court: I have it right in front of me. Aschenbrenner v. United States Fidelity & Guaranty Co., 292 U. S. 80. It is one of the leading cases on the subject. In other words, that is the leading case written by Justice Stone. He wrote with great clarity. He said if there are two courses open, then the one more favorable to the insured should be adopted.

In this case we are just talking about, the same type of contention was made that Mr. Gallagher is making, both with respect to the term "student pilot" and "renter pilot." He is attempting to give a narrowed and restricted meaning to those terms.

In the Aschenbrenner case it was contended that the word "passenger," as used in a policy of insurance giving a double indemnity if the person died while a passenger on a common carrier, that it was meant as "passenger" in the limited sense that one is a passenger on a common carrier for hire. [67] They held that one who was permitted to jump on the train was a passenger in that respect.

Mr. McGee: Yes, sir. They claimed that the definition of "passenger," as contained in the law of common carriers, pertained, and therefore, because the passenger, the alleged passenger, didn't meet that common-carrier definition of "pessenger,"

that he wasn't a passenger within the meaning of the insurance policy.

Well, as your Honor is familiar with the case, there is no necessity for me to quote the language.

The Court: I have it in front of me. I have done some studying of this case, as I usually do, after your memoranda reached me, and in preparation for the trial.

Mr. McGee: Yes, sir. Well, can we decide in this case, first, that Mr. Brown was not a bailee for hire? He was at the time in charge of a plane, using a plane on a solo flight, which had been hired for him by the Government.

Now, it is true that it was a part of a course that he was taking. It is also true that payment for that course was based upon the number of hours that a student used an airplane.

Let me refer your Honor to a federal case, the case of Massachusetts Mutual Life Insurance Co. v. Pistolesi, 160 F. 2d 668. That is cited in my memorandum of points and authorities. [68]

The Court: Yes.

Mr. McGee: In that case the Circuit Court of Appeals followed Section 1624 of the Civil Code of California as the rule of interpretation of a contract of insurance which was made to be performed in California. I think that we should also follow the definition of the Civil Code of California in this case with respect to a hiring.

Section 1925 of the Civil Code of California defines a hiring as follows:

"Hiring is a contract by which one gives to another the temporary possession and use of property, other than money, for reward, and the latter agrees to return the same to the former at a future date."

That, of course, can be implied.

Now, under the undisputed facts in this case the Phipps flying school had entrusted a plane to Brown, for the use of which the Phipps school was to be reimbursed by the Government.

The amount of money that was paid Phipps varied, according to whether or not it was ground instruction, in which no flight was involved, or according to whether or not it was flight instruction, in which the student used a plane.

When the student was using a plane, then the payments, according to the contract, were a great deal more, many times more, than that paid for the ground instructions. According [69] to Mr. Phipps they varied even according to the horsepower of the plane.

The Courts, so far as there is any law upon the subject, your Honor, have taken the attitude that the relationship—and I am sure Mr. Gallagher will be unable to cite any case to the contrary, as I think we both have researched this question pretty carefully for cases in point—between the student of a flying school and the flying school, in the case where the student is using a plane belonging to the school, is that of bailor and bailee.

I have already cited the cases so holding. Ambassador Airways v. Frank, 124 Cal. App. 56. In

that case a student was taking a course in a school in practical and theoretical flying. He paid a certain amount for his course of instruction.

He was flying a plane belonging to the school in solo at the time of the accident, and in determining the liability as between the school and the student it was held that the relationship of bailor and bailee applied.

The courts emphasize, as we have already observed, that the words in an insurance policy are to be taken in their popular sense. The courts probably go to dictionaries for the purpose of determining the popular meaning of a phrase.

I happened to look up the definition of "rent." "Rent," as defined by the New Standard Dictionary, popularly, is "The [70] compensation paid for the use of any kind of property, movable or fixed."

I might also, your Honor, refer to Central Flying Service v. Krieger, a case which is not cited in my brief. It is an Arkansas case, reported in 17 Commerce Clearing House, Negligence Cases 171, in which the hiring of a plane by a student is referred to as a renting.

May I also refer to 6 American Jurisprudence 25, in which the statement is made that the general rules of bailment apply to aircraft.

It seems to me, your Honor, that if a person is taking a course of instructions from, let us say, a driving school, and while he has a car belonging to that school in his possession, while he is driving

it alone upon the public streets, that he is a bailee for hire.

Now, Mr. Gallagher has suggested that he would make a distinction between one who himself physically paid the money and one on whose behalf the money was paid. I submit, your Honor, that that is an untenable distinction. That one is a renter, regardless of whether or not he himself physically paid the money or whether or not the money was paid on his behalf.

The Court: As I said before, I do not think it is material who pays the rent, if that relationship exists.

Mr. McGee: Your Honor, in order to find in this case [71] that Mr. Brown was other than a bailee for hire—and "renter" certainly means the same thing—that if he was other than a bailee for hire, that we have to ignore definitions of the relationship of bailor and bailee, as expressed by the California Civil Code, whenever one is using property which he has to return to somebody else, for which a reward is being paid. Such a situation creates a hiring of the property, and the relationship of bailor and bailee exists.

The Court: That is right. Do you not remember the famous statement of President Coolidge, when he was asked whether the foreign countries who had borrowed money from us during the First World War should repay it, and his answer was, "They hired the money, didn't they?"

Mr. McGee: I recall.

The Court: That is a famous statement. Where

you are getting the temporary use of something for compensation it is a hiring, whether you hire money or you hire an object. But there are many things to consider before you determine whether you are dealing with a straight hiring or bailment or another relationship.

Mr. McGee: Well, the insurance companies have been greatly criticized for using phraseology that is involved, and to which they attempt to give technical meanings. It seems to me here is a phraseology that is as plain as phraseology could be. [72]

A renter pilot to my mind means nothing other than one who is using a plane owned by the assured, for hire. Mr. Brown certainly was doing that, in this case.

Now, taking up the other phase of this, student pilot, as I understand Mr. Gallagher's argument it is essentially this: The term "student pilot" is not used in this policy in its general sense, in the sense in which anyone would understand that it is used, in hearing the phrase, as someone pursuing a course of study in a certain field, but that the term "student pilot" must be given a narrowed and restricted meaning. That it must be given the meaning in which that term is used in the C.A.A.

Mr. Gallagher: C.A.R.

Mr. McGee: I mean C.A.R., Civil Air Regulations of the Civil Aeronautics Administration, in which pilot ratings are set forth.

He makes that contention entirely upon the basis of the language used in item 7 of the declarations.

First of all, may I point this out: that in the

declarations of this policy we are dealing with the matters which define the scope of the policy as to Mr. Phipps. It is a statement setting up the circumstances under which the insurance, provided for in the policy, will be operative. Item 7 says, "The aircraft will be used only for the following purposes:" then it goes on to say, "Private business and [73] pleasure, passenger carrying for hire or reward, rental to others and student instruction.

"The aircraft will be operated only by the following pilots: Any private or commercial certificated and qualified pilot also any student pilot while under the supervision of a commercial certificated pilot having a pilot instructors rating issued by the C.A.A."

That, of course, means that there isn't any insurance, that Mr. Phipps didn't have any insurance under this policy, if the planes were being used under any other circumstances. Before the insurance provided by this policy for him attached, it had to be one of the classes of planes specified, and it had to be operated by any private or commercial certificated and qualified pilot, also any student pilot while under the supervision of a commercial certificated pilot, and so on. Unless those conditions were met, then the insurance sought to be provided by this policy was not operative.

Those declarations, as to the purpose for which the planes were to be used and the manner in which they would be used, were made a part of the policy and made declarations by virtue of which the policy was written. I am referring now to the sentence

of "Insuring Agreements." It says, "Agrees with the Insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and [74] subject to the limits of liability, exclusions, conditions and other terms of this Policy."

Now, then, it was possible when this policy was written to cover various classes, various persons or various classes of persons, on the one hand, which were Mr. Phipps and his employees. The declarations define the conditions under which there will be any insurance at all.

Next, the policy might have also covered any student pilot or any renter pilot who was operating one of Mr. Phipps' airplanes. But that is where the policy says there is no insurance.

I do not think that it is necessary here for us to get into a technical discussion as to whether or not (f) of clause III constitutes an exclusion or not. I think that there would be terrific merit in the argument that it does not constitute an exclusion. It is under "Insuring Agreements," and defines who are insured and who are not insured.

The Court: Ultimately, it does not make much difference, except there is an exclusion clause. I referred to it because I had not seen the photostat and I had not noticed that. But it was not under "Exclusions."

The courts have said that sometimes it makes a difference, so far as the burden of proof is concerned, if you are within an exclusion it is your duty to show yourself within it. [75]

In the last analysis, when the evidence is closed, the question is not decided in the question of the burden of proof, because ultimately the question is what the evidence shows, the interpretation of the evidence. The dispute is not what the evidence shows, but how to interpret it.

There is no disagreement between you as to the conditions which obtained, so it does not make any difference.

As I said, I referred to the "Exclusions" merely because I thought that the clause was in there, but on looking at the photostat I am satisfied that it is a part of the conditions, rather than exclusions.

Mr. McGee: The language, without any qualification, excludes, if we use that term, a student pilot.

It seems to me, your Honor, the narrow and restricted interpretation insisted upon by Mr. Gallagher would, if applied in this case, amount to rewriting the terms of the policy.

Bearing in mind the salutary rule of interpretations—some of the courts say the rule works both ways—we must use the language of a policy in its popular and ordinary meaning.

Can there be any doubt that Mr. Brown was a student pilot at the time of this accident? He was certainly pursuing a course of study. Everything he was doing was in connection with a supervised course of study, conducted by [76] the school. At the very time of the accident he was executing maneuvers that were necessary in this course of training, the purpose of which was to make it pos-

sible for him to take an examination for a higher rating.

Now, why wasn't he a student? Our item 7, which Mr. Gallagher relies on, defines the conditions under which the insurance will apply at all. It uses the term "Any private or commercial certificated and qualified pilot also any student pilot"—any student pilot—"while under the supervision of a commercial certificated pilot having a pilot instructor's rating issued by the C.A.A."

Now, a student pilot—any student pilot—the phraseology is that certainly a student pilot could be either a private pilot or he could even be a commercial pilot, who might be taking a course of study for the higher rating of instructor pilot.

The company in this case obviously did not want to insure student pilots. It didn't want the hazards involved in insuring student pilots. I suspect that is one of the reasons why they excluded student pilots. But whether there is any extra hazard involved or not, the company did not want to insure anyone who was taking a course of study in aviation as a pilot.

Now, we have the same proposition here, your Honor, substantially, that we had in one of the cases I cited, the [77] case of Bastian v. British-American etc. Company, 143 Cal. 287, in which there was a provision in a fire policy to the effect that the policy would be void if any dynamite was kept upon the insured's premises.

There was a fire, destroying the premises, and dynamite had been upon the premises, but it didn't

have anything to do with the fire. The contention was that that was an immaterial condition of the policy, in view of the fact that the dynamite which was kept on the premises had nothing to do with causing the fire.

The court held it was immaterial, whether it had anything to do with causing the fire or not, that the contract of the parties provided the policy would be void if any dynamite was kept on the premises.

In this case, your Honor, the company didn't want to insure student pilots——

The Court: Fire insurance policies are special policies. In fire insurance policies the court is very strict in taking into consideration that you insure not only goods, but you insure them in a particular place.

You remember the famous law library case, where the library was moved from the Chronicle Building in San Francisco, I think it was, and the courts held that the insurance company had insured it at that particular place, and when it was moved from that place the insurance company had a right [78] to be consulted as to the location where these books were stored. The mere fact they were moved to a place that was even more fireproof did not make any difference. You remember that case.

Mr. McGee: Yes.

The Court: In the law of insurance it is very difficult to switch policies from one field to another. There are different considerations that enter into determining liability.

Mr. McGee: In this case, your Honor, the company says, in effect, "We don't insure any student pilot." Now, if a policy such as this covers the liability of a student or a renter pilot, then, of course, the liability of the company is much extended, as compared with what it would be if it covered just the operations of just Mr. Phipps and any employees of Mr. Phipps.

For example, take this case. Mr. Phipps was not held in the judgment, but the pilot was.

Mr. Gallagher: We dismissed the case as to Mr. Phipps.

Mr. McGee: Yes, because there was no evidence of any negligence upon his part. Mr. Phipps and his employees would not be liable, in the absence of independent negligence on their part, in the absence of, let us say, being negligent with respect to the care of the plane or with respect to some acts of theirs which contributed to the happening of the accident. But student and renter pilots might be negligent [79] because of their own negligence, irrespective of any liability upon the part of the named insured.

The company has simply said, "We do not want to insure any student pilot or renter pilot." I contend, your Honor, that the language is unambiguous and admits only of the conclusions which we urge upon the court.

The Court: All right, Mr. Gallagher. We will have a short recess first.

(Short recess taken.)

The Court: Proceed, Mr. Gallagher.

Closing Argument on Behalf of the Plaintiffs

By Mr. Gallagher:

If your Honor please, I have some comments to make with respect to the bailee proposition. As I understand it, the question of bailee is that a man may be a bailee without paying anything for the use of the article. If he doesn't pay for the use of the article himself, and someone else does, the someone else who makes the payment is the bailee for hire, and the person who is in charge of the article, as the agent of the bailee for hire, of course, would be bound to perform all of the obligations of his principal toward the bailor. But that is not involved in this case.

We have the renter pilot. Now, Mr. McGee read to your Honor a definition of rent. But he didn't go quite far enough in the dictionary. "Renter" is also defined as "One [80] who rents lands, tenements, or other property; usually said of a lessee or tenant."

Now, Mr. McGee wants your Honor to construe this policy by giving the words their usual and ordinary meaning. Well, if we do that, with reference to "renter pilot," "renter" is an adjective and it defines "pilot," the noun. So we would say the lessee pilot, the man who makes the arrangements to rent the airplane.

Just as Mr. Phipps testified here, if I went out or if someone else went out to him and exhibited the proper qualifications, he would rent an airplane to that person for the purpose of permitting that

person to pilot the aircraft, and such person would be a renter pilot.

Now, with reference to the "student pilot" argument, Mr. McGee says to your Honor that the insurance company did not want to assume the hazards of indemnifying a student pilot because the student pilot is not qualified, he is inexpert, he is a bad risk.

The evidence in this case, if your Honor please, shows that Mr. Brown was certified and approved by the proper governmental agency as a certificated and qualified private pilot. The Government states that Mr. Brown was perfectly safe, insofar as his ability to fly the airplane was concerned, and to navigate it, and so forth and so on. Not only to fly that airplane on the civil airways which are used [81] by scheduled air lines, but to fly the airplane anywhere else in the United States he might choose to go. Not only to fly it for himself, but to carry passengers with him, just so long as he made no charge for carrying those passengers.

Now, I can readily understand why the insurance company would insure Mr. Phipps against his liability in the event a student pilot caused some damage, but would refuse to extend the coverage to the student pilot. The reason for it is that if Mr. Phipps turned an airplane over to a student pilot, but was not negligent in doing so, then Mr. Phipps wouldn't be liable for any damage caused by the student pilot for the reason that the student pilot is not an agent, servant, or employee of the

named insured. But the insurance company was willing to insure any private certificated and qualified pilot who was not a renter pilot, and that is exactly the situation here.

Counsel referred to the fact we weren't able to recover against Phipps. Well, I tried the case. I could find no evidence that Mr. Brown was the servant, agent, or employee of Mr. Phipps. Mr. Brown was a duly certified private pilot. There was no evidence to show that Mr. Phipps was negligent in turning the airplane over to Mr. Brown, and therefore I deemed it my duty to the court to dismiss the action with prejudice, insofar as Mr. Phipps was concerned.

But the fact that as to Mr. Phipps the action was [82] dismissed voluntarily hasn't a thing to do with the issues involved in this case. I respectfully submit to your Honor that Mr. Brown was not a student pilot and was not a renter pilot.

Your Honor will notice in Part 43 of the Civil Air Regulations restrictions with reference to the rights of student pilots, private pilots, and commercial pilots. The restrictions with reference to student pilots are that they may not solo, for instance, until they have received a notation on the back of their student pilot's permit, and they cannot, under any circumstances, carry passengers, and they cannot travel anywhere they choose—they must stay within certain areas—so that you have clear indications of the distinctions.

Now, counsel says that he wants your Honor to decide this case on the theory that simply because

Mr. Brown was building up time and was out there to do certain turns, because his instructor told him to do the turns, that therefore he is a student pilot and that that is the common meaning ascribed to those words.

I respectfully submit to your Honor that the trouble with that argument is this: Everyone is presumed to know the law. Therefore, the common man knows that under the terms of the federal statute, the Civil Aeronautics Act of 1938, and also under the statutes of the State of California, that no [83] person may, under any circumstances, be a pilot of an airplane unless he is qualified and permitted and licensed to do so, under the federal statutes and the Civil Air Regulations. Therefore, when the common, ordinary man, presumed to know the law, sees the words "student pilot" and when he reads this policy, which says "private pilot" and "commercial pilot" and "duly certificated," he knows that the insurance company is talking about the kind of a student pilot who is referred to in the Civil Air Regulations, and not to a pilot who is already qualified but who is taking some further work to increase his pilot rating.

That is all that Mr. Brown was doing here. He was not a student pilot. He was exactly in the same category as many men who, during the war, had private pilot ratings and were taken by the Army—and contract schools—and they were taken by the Navy, and were put through instructor's schools. They were not referred to as "student pilots" and they weren't student pilots, but they were given

further training by the services in order to qualify them as instructors.

Now, I respectfully submit to your Honor that this policy must be construed most strongly against the insurance company.

If the insurance company had wanted to exclude from coverage under the omnibus clause a private pilot, a duly certificated and qualified pilot, whom they specifically mention on the first page of their policy, when that pilot was [84] taking instructions to raise his grade to a commercial license, they could very easily have done so. They didn't do so.

If there is any ambiguity in the words "student pilot" or if those words may mean two things, one of which will give coverage to Mr. Brown and the other of which will not give coverage to Mr. Brown, then I respectfully suggest that under the rule those words should be construed in the way which will give coverage to Mr. Brown.

One very reasonable way to construe those words is to determine what is the meaning of "student pilot" under the federal statutes, rules and regulations which are the sole and exclusive governing rules with reference to flying airplanes in the air throughout the State of California and elsewhere.

The Court: All right, Mr. McGee, do you have anything further?

Mr. McGee: Yes, your Honor.

Closing Argument on Behalf of the Defendant

By Mr. McGee:

I think that I might clarify my argument with reference to item 7 of the declarations. Judging

from Mr. Gallagher's reply argument, I am afraid I didn't make myself quite clear.

Mr. Gallagher is assuming that the page of this contract entitled "Declarations" is the insuring agreements. He is [85] disregarding the obvious intent of the matter stated under item 7.

Under item 7 Mr. Phipps declared to the company that the purposes for which the planes would be used were as stated, and he declared to the company that the aircraft will be operated by a private pilot or commercial pilot or a student pilot under supervision.

Now, if Mr. Phipps had conducted a business other than he declared he was going to, with respect to this policy, then we would have a question as to whether or not, as to Mr. Phipps or his employees, the company could not deny liability because the aircraft was used contrary to the purposes and the conditions under which it was stated by Mr. Phipps in his declarations it would be used.

But when we come to the "Insuring Agreements" we reach the core of the contract as to the persons to whom the benefits of this policy are extended and are not extended, providing the contract is in effect at all, providing the contract has not been nullified because of some failure to follow the declarations made by the assured as to the nature of the use and the conditions of the use of the aircraft.

All I can say again, your Honor, is that when the company specifies those who are entitled to the benefits of the policy, it uses a term as inclusive

and as simple as language would be used in an insurance policy. [86]

The Court: Mr. Gallagher, do you want to have the last say?

Mr. Gallagher: I have said everything that I care to say, your Honor. [87]

The Court: The question confronting the court is one of interpretation of the words in a contract of insurance. The facts are without dispute.

We will start with the fact preceding the filing of this action, that a judgment was recovered by the plaintiffs here, as the heirs at law of the deceased, Walter John Petro, for death caused in a regrettable accident, which the judgment of the Superior Court found was brought about by the negligence of Philip Ray Brown.

It is also undisputed that Philip Ray Brown had had a private pilot's license and that he was receiving additional instructions under the GI Bill of Rights in a school operated by the Phipps Flying Service. Phipps Flying Service had a contract for education and training with the Veterans Administration, under which the Veterans Administration, as an instrumentality of the Government, agreed to pay for instructions of students. The rate was fixed on an hourly basis. Dual flight instruction was at the rate of $10.86, and solo flight was at the rate of $7.86 per hour.

The defendant here had entered into an agreement of insurance with Harry Phipps, doing business as Phipps Flying Service, denominated aviation liability policy. [88]

The defendant denies liability under it by reason of the clauses denominated (e) and (f) of Clause III of the insuring agreements.

This clause after defining the words "insured," specifies that it shall not include the following:

> "(e) any persons other than officers, executives and employees of the named Insured, or any agent of the named Insured, if the business of the named Insured (insured as such) is that of an aircraft manufacturer, or aircraft engine manufacturer, or aircraft repair or service station, or aircraft sales agency, or hangar keeper, or airport operator;
>
> "(f) or any person who is a student or renter pilot."

Subparagraph (f) is really the paragraph upon which the defense is based.

In approaching the problem I have had the benefit of the cases which counsel's memoranda have called to my attention, and my own experience in the field of insurance law.

Two fundamental principles are to be observed. First, that in construing insurance policies the courts insist that the contract shall be construed liberally, in accordance with the usual rules in such cases.

In Boulter v. Commercial Standard Insurance Co., 1949, [89] Ninth Circuit, 175 F.2d 763, the court said, at page 767:

> "Not only must the policy be liberally con-

strued in favor of the insured, in accordance with the usual rule in such cases, Aschenbrenner v. U. S. Fidelity & Guaranty Co., 292 U. S. 80, 54 S.Ct. 590, 78 L.Ed. 1137, but the language of the Commissioner's rider must be construed to accomplish the purposes of the Highway Carriers' Act. We think that the legislative requirement was intended to secure the general public in respect to accidents caused by such trucks when operating on the public highways, whether loaded, or merely cruising in search of loads."

In that case, as I stated before, a jury had decided in favor of liability. Under the power given me by the Federal Rules, I reserved a motion for a judgment, notwithstanding the verdict, until after the jury came in. And after the jury came in and arguments presented on the part of counsel, I became convinced, and I wrote an opinion that was very convincing to me, but evidently not convincing to the Court of Appeals, to the effect that the question should not have been submitted to the jury at all, and that on the facts involved there was no liability.

The opinion was, in my opinion, entitled to the same consideration as found in Boulter v. Commercial Standard Insurance Co., 78 F.Supp. 895. I referred to my own cases, [90] and, as I used to do when I taught law, I referred to my successes as well as to my failures.

This case served to point up how courts can arrive

at different conclusions on the basis of the same law. The decision of the Court of Appeals emphasizes the point, that in considering a contract of insurance of this character it must be construed most favorably in favor of the insured. In so doing we are not limited to the particular wording of any part of the contract. The contract must be considered as a whole, and if necessary to take into consideration riders attached, that might throw light upon the subject, those riders are to be read into the insurance policy for that purpose.

In that particular case the court resorted to the rider required by the Highway Carriers' Act to sustain its contention that, although the evidence showed clearly that at the time of the accident no goods for hire were being carried, and that the man was not on a return trip, but, nevertheless, because he testified that on this return trip which he took chiefly for the purpose of paying an insurance premium in San Francisco, although returning from a vacation spot where he had taken his wife and mother-in-law, that his statement that he had thought of soliciting while he was there, that is, soliciting hauling, and although he did not get around to it, that that was sufficient to come within the rule of the [91] return trip which, of course, says that if you go one way and carry a load and return to your fixed terminus, as it were, your return trip is just as much a part of your trip as the going trip.

The case illustrates the view that in cases of doubt—and certainly that case presented a doubtful

situation—the doubt should be resolved in favor of the insured.

Incidentally, in that case I did something which is possible to do under the federal courts, and I made it absolutely unnecessary to retry the case. I denied a motion for a new trial. I could have decided in the alternative by saying, "If this is reversed I will grant a new trial." I would not do that. I denied the motion for a new trial. All the court had to do was decide the legal question. If they decided against my ruling, it automatically restored the verdict of the jury. If it agreed with me, the judgment entered notwithstanding the verdict stood. In either event it was not necessary to retry the case. I have always pointed to that power as indicating when judges are given discretion that that discretion can be used to great advantage to achieve justice.

Here was a case where I was greatly worried by the verdict of the jury. I expressed my worry by writing a very exhaustive opinion. I thought I had found every case in California that bore on the subject. I did not want to [92] substitute my judgment of the facts for that of the jury, but I felt that I should not have submitted the case to the jury, in the first place. By exercising this power I was in a position to merely delay the conclusion of the case, and, whether affirmed or reversed, that it would terminate the case without requiring another trial.

Now, there is one other principle before us, and I think the case that Mr. McGee cited contains a

very sincere statement of law. It is written by my former colleague on the Superior Court, Judge Doran. It is Greenberg v. Continental Casualty Company, 24 C.A. (2d) 506. The court said, at page 513:

> "The law applicable to the disputed questions is solely the law of contracts, and in that connection it is elementary that parties to a contract are entitled to have the agreement enforced according to its terms. When, of course, a contract is uncertain and ambiguous it becomes the duty of the court to determine, if possible, what is intended, but in the absence of such ambiguity and uncertainty, and when the contract is in all respects valid, the power of the court is limited to enforcing such contract according to its terms. In that connection it might be appropriately observed that, 'It is competent for the parties to make whatever contracts they may please, [93] so long as there is no fraud, or deception or infringement of law. Hence the fact that the bargain is a hard one will not deprive it of validity.' (Herbert v. Lankershim, 9 Cal. (2d) 409 (71 Pac. (2d) 220).)"

The courts of California, in interpreting the words of a contract of insurance, have applied the general rule which is set forth in the California Civil Code, Section 1644, which says: "The words of a contract are to be understood in their ordinary and popular sense."

In Massachusetts Mutual Life Insurance Company v. Pistolesi, 160 F.2d 668, Judge Denman adopted the principle as a criterion to follow. He says, "In California, insurance policies are so construed." That is, according to ordinary and popular sense.

But there is also one other principle which is to be borne in mind, and that is where parties to a contract, especially an insurance contract, are dealing with the words of an art, that the presumption is they are used in the contract in the sense in which they are used in that art. When we speak of "art," we do not mean necessarily the sense in which that word is used in patent law or in copyright law. But we mean the sense in which the word is used in the particular branch of human activity with which the contract deals. So, when that is the case and the word, as used in [94] the art, has a definite meaning, then ordinary dictionary definitions do not help us.

To come to the contract, we find that in the "Declarations, Item 7," it contains the following statement:

> "The aircraft will be used only for the following purposes: Private business and pleasure, passenger carrying for hire or reward, rental to others and student instruction."

And, further:

> "The aircraft will be operated only by the following pilots: Any private or commercial certificated and qualified pilot, also any student

pilot while under the supervision of a commercial certificated pilot having a pilot instructors rating issued by the C.A.A."

The "Insuring Agreements," in defining the insured, excluded the persons referred to under clauses (e) and (f).

Counsel seeks to draw the distinction between Item 7 of the "Declarations" and clause (f) of III of the "Insuring Agreemnts," as though the first one were merely a limitation of scope of the use of the airplanes, and the second a condition. I believe the two go together and must be construed together.

If there is a conflict between the typed portion which is written into the contract and the printed portion which is [95] paragraph (f) of Section III, then under a rule of construction which considers the typed portion as a special condition which modifies the printed portion, which is usually added to every contract, especially one like this, which was written on a separate page, then that rule applies. That is a very well-known rule.

We also have the additional rule that construction should be reasonable and should not give a construction that would result in absurdity.

In the first place, the typed portion of this contract showed that the words in this were words of art, that they were using the words that were covered by the regulations. We have a direct reference to the ratings issued by the C.A.A. So it is quite evident they were writing this contract and were

not using Webster's Unabridged Dictionary. They were using words which had definite meaning in the regulations.

So that when they referred to the fact that the aircraft covered was to be operated only by private or commercial certificated and qualified pilots, and also any student pilot while under the supervision of a commercial certificated pilot, they used all those three words in the sense in which they are used in the regulations.

The record in this case shows that Mr. Brown had a private certificated license. He was not a student pilot. He was a person who had satisfied the requirements to entitle [96] him to that, to the certificate. Had he wanted the certificate changed to a commercial certification, he needed additional instructions. These he proceeded to secure.

While he was securing these additional instructions he was still a private certificated pilot, and not until he had satisfied the authorities that he was entitled to the broader license did he lose his standing as a private certificated pilot. If he had secured the higher standing, then this certification would have been taken away and he would have ceased to have been a private certificated pilot.

I am of the view, therefore, that, in the light of the facts here and the language of this section, the word "student" in Section III, paragraph (f), cannot apply to the situation here. That that word implies a novice, as someone used the word, a person who has no standing as a pilot, and who is merely receiving instructions. It is the same as a

student driver, under the California Motor Vehicle Act, who is one who is given a learner's certificate which enables him to sit at the wheel of a vehicle and receive instructions in driving, so long as he has someone else along who directs him. That learner's certificate is picked up as soon as he has passed his driver's test and the test of the Motor Vehicle Act, and it is replaced by a regular driver's license.

A person who already has one type of pilot's license, and who seeks additional instruction to secure a broader license, [97] is in the same position as a seaman, an able-bodied seaman, who seeks a higher rating in the merchant marine. We all know that he must take an examination to satisfy the authorities that he is entitled to the higher rating. The first question we ask him, as a seagoing man, is, "What papers do you carry?" It will be second mate, first mate, or——

Mr. Gallagher: Apprentice seaman.

The Court: ——apprentice seaman, able-bodied seaman. Each of them is a stage of development. By the same token, each of them is a distinct category, so recognized by maritime law. I am using that as an illustration. That is one of the easiest examples that occur, which shows we are dealing with a special business or enterprise and we are using words of art and we are presumed to use them in a sense in which they are known. It could not be argued that we should interpret "able-bodied seaman" as the words are interpreted in the dictionary. It would be absurd. The word "able"

has acquired a definite meaning in that respect and I do not think it has anything to do with ability at all.

I am of the view that the limitation of liability to student pilots was clearly intended to apply to persons who take their first instructions before they secure any license which entitles them to operate a plane, under the circumstances. It was not intended to cover a person who already had a license as a private certificated pilot, because if it [98] were not interpreted in this manner we would have the anomalous position of a person who, by the provision of this typewritten portion of the contract, had a right to operate this aircraft, with a condition that is of a character so strictly construed that if the person deviated from that and allowed operation by others it would destroy liability or suspend liability until there had been a cure of the provision.

We have a person who is specifically designated as one of the types of persons who is allowed to operate this aircraft and as to whom the insurance is in full force, and yet we get third persons being deprived of the benefits of this policy which specifically designates the tort feasor, by reason of the fact that elsewhere in the policy there is a word which, if interpreted not in the sense in which the word is interpreted in the art but in the sense in which it is interpreted in the dictionary, might cover the person.

I agree, of course, that the word "student" is broad enough to cover anyone who studies. I gave a lecture the other day to the Law School at

U.C.L.A. and I addressed them as "fellow students." I told them I did not do it facetiously, but I did it to impress upon them that after 40 years, 23 years of which I spent on a bench, I still consider myself a student, and that the profession they were entering into would require their continuing to be students for the rest of their lives. So the word "student" may apply to anyone that [99] receives instructions, who receives tuition from someone.

Supposing I should decide to go back to teaching law, as one of the judges of our courts, Owen Roberts, who retired from the Supreme Court, did, and went back to teaching. He is Dean of the University of Pennsylvania now. He did that, not by retiring, but he resigned, and therefore he could do that.

Supposing Judge Roberts were to decide he wanted to teach a course in international law and that he needed additional tuition and enrolled himself under one of the international lawyers to study law. It could not be contended that a policy that referred to law students would cover that person, or that a clause which said "apprentices in law" would cover such a person, although in the dictionary meaning anyone who is trying to develop a skill, which he does not possess, may be an apprentice for that particular purpose.

I am satisfied that to interpret the contract as the defendant contends, we would have to find a contradiction between this clause which excludes students and the clause which specifically provides

that a person who has the type of license which Mr. Brown had can operate the airplane, and that the insurance policy specifically covered him. Assuming that as a contradiction, then we must interpret it in favor of the insured, and such interpretation would also be commanded by the rule that typewritten portions of a document, [100] put in specifically for the preparation of the particular instrument, are to be given greater weight than the printed portions, and if there is a conflict between the two it is to be assumed by the typewritten portion they put in that they intended to modify the general clauses which are contained elsewhere.

Neither does the renter clause help the defendant. Section 1925 of the Civil Code defines "hiring":

> "Hiring is a contract by which one gives to another the temporary possession and use of property, other than money, for reward, and the latter agrees to return the same to the former at a future time."

That section dates back to 1872. I checked the last edition of the Code and it has been, despite the adoption of the uniform bailment statute, absolutely unchanged, and it reads identically in the newest edition of the Code for 1949.

The general definition is modified by Section 1930, which says, "Thing let for a particular purpose. When a thing is let for a particular purpose the hirer must not use it for any other purpose; and if he does, he is liable to the letter for all damages resulting from such use, or the letter may treat the contract as thereby rescinded."

I think in that sense anyone who is allowed to use the property of another, as the result of a contract of employment, [101] may be said to be a hirer. For instance, my secretary is permitted, under the law of the United States, to use a typewriter which the Government furnishes. In one sense, if a question of liability arose, it could be said, so far as her relationship to the machine is concerned, she hires it. She is allowed to use it temporarily. It is a gratuitous bailment. But her relationship to the Government and to me is not determined by the incidental fact that, as part of her secretarial duties, she is allowed to use this typewriter. Her relationship to the Government and to me is determined by the agreement which lays down the conditions of her employment. And the mere fact that incidentally she is allowed to use temporarily property, the safety of which she is charged with, would not turn the agreement into a contract of hire.

Now we come to the contract under which the instruction was being received. It calls for "Contract for Education and Training—Public Law 346, Seventy-Eighth Congress, as Amended.

"This contract made as of this 25th day of June, 1947, between the Veterans Administration and Phipps Flying Service (hereinafter referred to as the Contractor), an institution established and existing under the laws of the State of California and located at El Monte Airport, El Monte, California

"Witnesseth: [102]

"Whereas, the Veterans Administration is authorized to pay for such courses of education and training as eligible veterans may elect under and within the limits of Public Law 346, as amended, and

"Whereas, the Contractor has been properly approved as being qualified and equipped to furnish education and training under Public Law 346, as amended, by The State Department of Education, State of California

"Now, Therefore, in consideration of the promises and mutual covenants and agreements hereinafter contained, the parties hereto do mutually agree as follows:

"Article 1. Instruction

"(a) The Contractor will provide instruction and the necessary books, supplies, and equipment therefor, as set forth in paragraphs (b) and (c) hereof during the period beginning July 1, 1947, and ending June 30, 1948, for such eligible veterans who choose to enroll in and are accepted or retained in courses provided by the Contractor according to the standards of the Contractor and who are approved by the Veterans Administration as entitled to education and training under Public Law 346, Seventy-eighth Congress, as amended. [103]

"(b) The Contractor will provide such courses of instruction at the charges listed and described in Schedule 1 attached hereto or as set forth in the catalogs, bulletins, or other publications or sched-

ules which are submitted herewith and identified in Schedule 1 as a part of this contract.

"(c) The Contractor will furnish outright to the veteran, as needed, such books, supplies, and equipment as are necessary for the satisfactory pursuit and completion of the courses as referred to in paragraph (b) above. It is understood and agreed that the books, supplies, and equipment to be so furnished will consist of those items required, but in no instance greater in variety, quality, or amount than are required by the Contractor to be provided personally by other and all students pursuing the same or similar courses."

Then follow other clauses which do not interest us, relating to compensation for books, supplies, and equipment, method of payment, limitation of $500.00 for individual course, and providing for records and reports on individuals, for inspection, and for proration of charges.

Article 6 is the "Termination," and Article 7 is "Limitation."

Then follows, as a part of the contract, a typewritten [104] portion describing the rates, and it gives the maximum length of complete course in terms of weeks, and a minimum in terms of weeks, and gives the cost of instruction, which, for flight instruction in 65 H.P. aircraft, specifies: Dual at $10.86 per hour, and Solo at $7.86 per hour.

Then it specifi$es the cost of the ground instruction and the books and supplies, and the total cost of the course, which is: flight instruction, a maximum of $395.40 and a minimum of $320.10, and for

ground instruction a maximum of $30.00 and a minimum of $30.00. Then there is a maximum for books, supplies, and equipment.

Then it lists the commercial pilot course, and then other courses, which are catalogued.

Now, this contract is properly a contract for education. The Government agreed with the operator of the school that he should furnish this instruction which the Congress of the United States, out of its sense of gratitude to those that served in the armed forces, paid for.

Now, as a matter of fact, there is not even a direct provision designating the airplanes which are to be used. I presume that one cannot perform a solo flight except in an airplane. The possibility of having a flight in a dummy, I presume, might call for a dummy plane. But this contract is a contract for education, and the airplane to be furnished and the supplies, which are listed along with the books [105] and other things, are the media through which the instruction is to be imparted.

So the mere fact that incidental to the instruction, as a part of it, it calls for the use by the student of an airplane, does not change the contract into a contract for hiring, any more than the fact—using the same illustration—that my secretary, in the performance of her duties, uses a typewriter. She may occasionally even use a stenciling machine. That does not change the contract which she has entered into with the Government. And in the contract for the hiring of a typewriter, especially, it is an employer and employee relationship. This

relationship is the relationship of master and pupil.

In judging the application of this contract we have to determine the relationship according to the conditions which the parties themselves, at the time, laid down, and because one facet of the relationship involved a temporary use of an airplane, which might, in a dictionary sense, be called a hiring, you cannot transform a contract to furnish education and instruction into a contract of hiring, in order to bring it within an exception of the rule, within a rule which says that the insurance policy shall not apply to hiring, especially when the policy within itself specifies specifically that a person who has a private pilot's license is permitted to operate the plane. [106]

I am of the view that the contract of insurance here covered the particular liability, and that the death of the deceased was caused while the plane was being operated by a person who had a right to operate it, and that whether we apply the law of California or whether we apply the law of the United States, the result is the same.

I think my remarks may be closed by repeating the words of Mr. Justice Stone in Anschenbrenner v. United States Fidelity & Guaranty Co., 292 U. S. 80, at page 84:

> "The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policy holder who is often without technical training, and who rarely accepts it with a law-

yer at his elbow. So if its language is reasonably open to two constructions, that more favorable to the insured will be adopted, . . . and unless it is obvious that the words are intended to be used in their technical connotation they will be given the meaning that common speech imports."

In this case I have pointed to the fact that the words used were words which had gone into common speech by being the words of an art. The contract was drawn with full knowledge of the regulations and with the very references to the authority which made the regulations, so that the [107] interpretation of the words must be that which is consistent with the regulations.

Judgment will be for the plaintiffs, as prayed for in the complaint.

You, Mr. Gallagher, will prepare findings, which you will serve on the other side. Under our rules the other side will have five days in which to file objections.

Thank you very much for the quickness with which you presented the case. I may say, gentlemen, the way the facts were, I do not see what purpose a jury would have served. I would not have allowed it to have gone to the jury. It is a question of statutory interpretation, as it turned upon a question of interpretation of words. I doubt if I would have felt justified in allowing the case to have gone to a jury, on the ground that it is ambiguous.

Mr. Gallagher: Would your Honor allow me,

say, until the 20th of December within which to prepare these findings? I am very much swamped with matters that I am compelled to finish to meet deadlines.

The Court: All right.

Mr. McGee: I know both Mr. Gallagher and I want the insurance contract in evidence. It has been used, and there was some doubt in my mind as to whether or not it was actually introduced in evidence.

Mr. Gallagher: May I offer it? [108]

The Court: No, you do not have to do that. We will give the contract of insurance, which is attached to defendant's answer, an exhibit designation, and it will be received in evidence.

The Clerk: Plaintiffs' Exhibit 3.

Mr. McGee: So stipulated.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 3 in evidence.

(The document referred to was marked Plaintiffs' Exhibit No. 3 and received in evidence.) [109]

PLAINTIFFS' EXHIBIT No. 3

Aviation Liability Policy
The Ohio Casualty Insurance Company
Hamilton, Ohio

A Capital Stock Company

[Penciled in margin: F083763 1405 Kenwood.]

Declarations

Item 1. Name of Insured: Harry Phipps dba Phipps Flying Service and/or Coast Aero Sales, a California corporation hereinafter referred to as the named insured).
Address: El Monte Airport, El Monte, California.
The occupation of the Insured is Flying Service.

Item 2. Term of Policy: From February 29, 1948, to February 29, 1949, 12:01 A.M. Standard Time at the address of the Named Insured as stated herein.

Item 3. The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the Company's liability against each such coverage shall be as stated herein, subject to all of the terms of this policy having reference thereto:

Coverages	Limits of Liability	Premiums
A. Bodily Injury Liability (Excluding Passengers):		
	$ 50,000.00 Each Person	
	$200,000.00 Each Accident	$ 978.19
B. Bodily Injury Liability (Passengers) As respects two-place aircraft:		
	$ 10,000.00 Each Person	
	$ 10,000.00 Each Accident	$ 270.00
C. Property Damage Liability:		
	$ 20,000.00 Each Accident	$ 785.45
D. Medical Payments:		
	Not Covered	Nil
Endorsement #2 Minimum and Deposit Premium:		$ 100.00
	Total Annual Premium....	$2,133.64

Item 4. Named Insured's interest is that of Owner.

Item 5. The aircraft will be hangared at El Monte Airport, located at El Monte, California.

Item 6. Description of the aircraft:
As per schedule of aircraft as shown on Endorsement Number 1 attached hereto.

Item 7. The aircraft will be used only for the following purposes: Private business and pleasure, passenger carrying for hire or reward, rental to others and student instruction. The aircraft will be operated only by the following pilots: Any private or commercial certificated and qualified pilot, also any student pilot while under the supervision of a commercial certificated pilot having a pilot instructors rating issued by the C.A.A.

Item 8. No Insurer has ever cancelled, or declined to issue or renew any aircraft insurance to the named insured except as follows: No Exceptions.

ELLIOTT & COMPANY,

Countersigned
By /s/ E. F. CAWFORD,
Authorized Agent.

The Ohio Casualty Insurance Company
Agrees with the Insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this Policy:

Insuring Agreements

I. Coverage A—Bodily Injury Liability (Excluding Passengers)

To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, other than passengers, caused by accident and arising out of the ownership, maintenance or use of the aircraft.

Coverage B—Bodily Injury Liability—Passengers

To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any passenger or passengers, caused by accident and arising out of the ownership, maintenance or use of the aircraft.

Coverage C—Property Damage Liability

To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property (excluding property owned, rented, leased, in charge of, or transported by the Insured), including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the aircraft.

Coverage D—Medical Payments

To pay to or for each passenger, pilot and member of the crew, who sustains bodily injury, sickness or disease caused by accident, the reasonable expense of necessary medical, surgical, ambulance, hospital and professional nursing service, and in the event of death resulting therefrom reasonable funeral expense, all incurred within one year from the date of accident, sustained while in, or upon entering or leaving the aircraft insured herein.

II. Defense, Settlement, Supplementary Payments

It is further agreed that as respects insurance afforded by this policy the Company shall

(a) defend in his name and behalf any suit against the Insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Company shall have the right to make

such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the Company;

(b) pay all premiums on bonds to release attachments for any amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the Insured in any such suit, all expenses incurred by the Company, all interest accruing after entry of judgment until the Company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the Company's liability thereon, and expenses incurred by the Insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

The Company agrees to pay the amounts incurred under this Insuring Agreement, II, except settlements of claims and suits which are covered under Agreement I, in addition to the applicable limit of liability of this policy.

III. Additional Insured

The term "Named Insured" shall mean only the Insured specified in Declaration 1.

The term "Insured" shall include not only the Named Insured but also any other person while riding in, or a pilot approved hereunder, while operating such aircraft, and any other person legally responsible, other than as pilot, for its operation, provided such operation is with the permission of the Named Insured, but shall not include:

(a) any person with respect to any loss against which he has other valid and collectible insurance;
(b) any person with respect to bodily injury to or death of any person who is a named Insured;
(c) any aircraft manufacturer, or aircraft engine manufacturer, or any aircraft repair or service station, or aircraft sales agency, or hangar keeper or airport operator, or flying school;
(d) any employee of an Insued with respect to any action brought against said employee because of bodily injury to or death of another employee of the same Insured injured, in the course of employment by such Insured in an accident arising out of the maintenance or use of said aircraft in the business of such Insured;
(e) any persons other than officers, executives and employees of the named Insured, or any agent of the named Insured, if the business of the named Insured (insured as such) is that of an aircraft manufacturer, or aircraft engine manufacturer, or aircraft repair or service station, or aircraft sales agency, or hangar keeper, or airport operator;
(f) or any person who is a student or renter pilot.

IV. Temporary Use of Substitute Aircraft

In the event the named Insured is an individual and owns only the aircraft insured hereunder, while such insured aircraft is withdrawn from use because of its breakdown, repair, servicing, loss or destruction, such insurance as is afforded by this policy with respect to such aircraft applies with respect to another aircraft of no greater horsepower or seating capacity not owned by the named Insured and while temporarily used as a substitute for such aircraft. This insuring agreement does not cover as an Insured the owner of the substitute aircraft or any employee of such owner.

V. Policy Period, Territory, Purposes of Use

This policy applies only to accidents which occur during the policy period while the aircraft is within the United States of America, its territories or possessions, the Dominion of Canada, Newfoundland, or the Republic of Mexico, and is owned, maintained, and used for the purposes stated as applicable thereto in the Declarations.

Exclusions

This Policy Does Not Apply:

(a) to bodily injury to or death of any employee of the Insured while engaged in the duties of his employment; or to any obligation for which the Insured may be held liable under any Workmen's Compensation Law; or to liability assumed by the Insured under any contract or agreement; or while the aircraft is used, with the knowledge or consent of the Insured for unlawful purposes;

(b) while the aircraft is being operated in violation of the regulations of the Civil Aeronautics Administration applying to (1) acrobatic flying, (2) instrument flying, (3) repairs, alterations and inspections, (4) night flying; or while the aircraft is being operated in violation of the terms of the Civil Aeronautics Administration Pilot Certificate or Airworthiness Certificate; or while the aircraft is being used for purposes other than those specified in the schedule of declarations or while being flown or driven (other than taxiing by certificated pilots and mechanics) by any person other than the pilots named or described herein; or while the aircraft is being operated in or in connection with any prearranged race, speed or endurance test, or in any attempt at record breaking or in acrobatic flying; or any use in respect to which a waiver issued by the Civil Aeronautics Administration is required, whether granted or not.

Definitions

1. Aircraft Defined.

The word "aircraft" wherever used in this policy shall mean the aircraft described herein. When two or more aircraft insured hereunder, the terms of this policy shall apply separately to each.

2. Passenger Defined.

The term "passenger" or "passengers" wherever used in this policy shall mean any person or persons (other than a person operating the aircraft or a member of the crew of said aircraft while in the course of their employment by the Insured) while in or on or while boarding the aircraft for the purpose of riding therein or while alighting from the aircraft following a flight or attempted flight therein.

3. Acrobatic Flying Defined.

The term "acrobatic flying" wherever used in this policy shall mean any intentional maneuver of the aircraft not necessary to air navigation; but the term "acrobatic flying" shall not mean flying required by the Civil Aeronautics Board for Pilot Certification qualification.

Conditions

1. Limits of Liability.

The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the Company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by one person in any one accident; the limit of such liability stated in the declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total limit of the Company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, including death at any time resulting therefrom, sustained by two or more persons in any one accident.

The inclusion herein of more than one Insured shall not operate to increase the limits of the Company's liability.

The limit of liability for medical payments stated in the declarations as applicable to "each person" is the limit of the Company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury, including death resulting therefrom, in any one accident.

2. Notice of Accident.

Upon the occurrence of an accident written notice shall be given by or on behalf of the Insured to the Company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the Insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.

3. Notice of Claim or Suit.

If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.

4. Assistanee and Cooperation of the Insured.

The Insured shall cooperate with the Company and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlements, seeuring and giving evidence, obtaining the attendanee of witnesses and in the conduct of suits; and the Company shall reimburse the Insured for expenses, other than loss of earnings, incurred at the Company's request. The insured shall not, except at his own eost, voluntarily make any payment, assume any obligation or incur any expense other than for sueh immediate medical and surgical relief to others as shall be imperative at the time of accident.

5. Proof, Reports and Payment of Claim for Medical Payments.

The injured person or someone on his behalf shall, as soon as practieable after such request from the Company, furnish reasonably obtainable information pertaining to the accident and injury, and execute authorization to enable the Company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physieians selected by the Company when and as often as the Company may reasonably require.

As soon as practieable after completion of the services or after the rendering of services which in cost equal or exeeed the limit of liability for medical payments or after the expiration of one year from the date of the aeeident, whiehever is the first, the injured person or someone on his behalf shall give to the Company written proof of elaim under oath, stating the name and address of each person and organization which has rendered serviees, the nature and extent and the dates of rendition of such services, the itemized eharges therefor and the amounts paid thereon. Upon the Company's request, the injured person or someone on his behalf shall cause to be given to the Company by each such person and organization written proof of claim under oath, stating the nature and extent and dates of rendition of such services, the itemized charges therefor and the payments received thereon.

The Company shall have the right to make payment at any time to the injured person or to any such person or organization on aeeount of the services rendered, and a payment so made shall reduce to the extent thereof the amount payable hereunder to or for sueh injured person on aeeount of such injury. Payment hereunder shall not eonstitute admission of liability of the insured or, except hereunder, of the Company.

6. Changes.

Notice to any agent or knowledge possessed by any agent or by any other person shall not effeet a waiver or a ehange in any part of this policy or estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or ehanged, except by endorsement signed by the President or Sceretary of the Company, issued to form a part of this policy.

7. Assignment.

No assignment of interest under this policy shall bind the Company until its consent is endorsed hereon; if, however, the named Insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless cancelled, shall, if written notice be given to the Company within thirty days after the date of such death or adjudication, cover (1) the named Insured's legal representative as the named Insured, and (2) subject otherwise to the provisions of Agreement III, any person having proper temporary custody of the aircraft, as an Insured, until the appointment and qualification of such legal representative, but in no event for a period of more than thirty days after the date of such death or adjudication.

8. Cancellation.

This policy may be canceled by the named Insured by mailing written notice to the Company stating when thereafter such cancelation shall be effective. This policy may be canceled by the Company by mailing written notice to the named Insured at the address shown in Item 1 of the declarations of this policy stating when not less than five days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the Insurance under this policy shall end on the effective date and hour of cancelation stated in the notice. Delivery of such written notice either by the named Insured or by the Company shall be equivalent to mailing.

If the named Insured cancels, earned premiums shall be computed in accordance with the customary short rate table. If the Company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancelation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective. The Company's check or the check of its representative mailed or delivered as aforesaid shall be sufficient tender of any refund of premium due to the named Insured.

9. Action Against Company.

No action shall lie against the Company unless, as a condition precedent thereof, the Insured shall have fully complied with all of the terms of this policy, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Company.

Any person or his legal representative who has secured such judgment or written agreement shall thereafter be entitled to recover under the terms of this policy in the same manner and to the same extent as the Insured. Nothing contained in this policy shall give any person or organization any right to join the Company as a co-defendant in any action against the Insured to determine Insured's liability.

Bankruptcy or insolvency of the Insured or of the Insured's estate shall not relieve the Company of any of its obligations hereunder.

10. Other Insurance.

If the Insured has other insurance against such loss covered by this policy the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against loss. However, the insurance under Insuring Agreement IV shall be excess insurance over any other valid and collectible insurance available to the Insured, either as an insured under a policy applicable with respect to the aircraft or otherwise, against such loss covered under either or both of said Insuring Agreements.

11. Subrogation.

In the event of any payment under this policy the Company shall be subrogated to all the Insured's rights of recovery therefor and the Insured shall execute all papers required and shall do everything that may be necessary to secure such rights.

12. Inspection.

Any duly authorized representative of the Company shall be permitted to inspect the aircraft and to examine the Insured's books and records relating thereto, at any time during the policy period and within one year after the final termination of this policy or until final settlement of all claims hereunder, whichever is later.

13. Declarations.

By acceptance of this policy the named Insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations, and that this policy embodies all agreements existing between himself and the Company or any of its agents relating to this insurance.

14. Terms of Policy Conformed to Statute.

Terms of this policy which are in conflict with the statutes of the state wherein this policy is issued are hereby amended to conform to such statutes.

In Witness Whereof, the Ohio Casualty Insurance Company has caused this Policy to be signed by its President and Secretary and countersigned on the declaration page by a duly authorized agent of the Company.

/s/ HOWARD HAWKER,
President.

/s/ MARTIN J. WYS,
Secretary.

AMERICAN AVIATION UNDERWRITERS,

By /s/ S. T. McNUS,
Underwriter.

Short Rate Table showing percentage of premium earned each month—Interim dates are computed in accordance customary short rate table:

Months subsequent to policy issuance	1	2	3	4	5	6	7	8	9	10	11	12
Percentage of annual premium earned	20	30	40	50	60	70	75	80	85	90	95	100

Aviation Liability Policy
Number OL 5756

Issued to Harry Phipps dba Phipps Flying Service and/or Coast Aero Sales, a California Corp.

Expires February 29, 1949

The Ohio Casualty Insurance Company
Hamilton, Ohio

Issued Through
American Aviation Underwriters
Elliott & Company
Insurance

Telephone MIchigan 4971
448 So. Hill St. - Los Angeles 13

Please Read Your Policy
Aviation Form No. 5

No. 2

Liability
Reporting Form Endorsement

It is hereby understood and agreed that: This endorsement applies only to aircraft with three or more seats.

1. Automatic Attachment and Termination of Coverage:

The coverage provided under this policy shall automatically apply with respect to any "NC" certificated aircraft owned or operated by the Insured, from the time such aircraft comes into the possession of the Insured until such time as the aircraft leaves the possession of the Insured, providing such aircraft are reported to the American Aviation Underwriters, 60 Sansome Street, San Francisco 4, California within a period of fifteen days from the time said aircraft comes into the possession of the Insured. The Company shall not be liable for any claims with respect to aircraft which have not been reported as provided for.

2. Monthly Declarations:

The Insured undertakes to keep accurate records of all aircraft falling within the scope of this policy, showing in such records the make, year and type of aircraft, its CAA Certificate Number (NC), the total number of passenger seats, excluding the crew, and the periods of time during which such aircraft were at risk under this policy. The Insured further undertakes to send to the American Aviation Underwriters, monthly on or before the 15th

day of each month during the currency of this Policy, a declaration setting forth this data with respect to the said aircraft during the preceding calendar month.

3. Rates of Premium:

Premium shall thereupon be computed at the following rates:
Per Passenger Flying Hour

No.	Coverages	Limits of Liability	Rate
A	Bodily Injury (Excluding Passengers)		(1 pass.—$0.15
B	Bodily Injury (Passengers)	$10,000 per seat	(2 pass.— .24
			(3 pass.— .33
C	Property Damage Liability		
D	Medical Payments		

4. Minimum/Deposit Premium:

The premium of $100.00 for which this Policy has been written shall be the Minimum/Deposit Premium. This Minimum/Deposit Premium of $100.00 shall be paid upon delivery of this Policy to the Insured, and shall be retained by the Company. The Insured shall then pay the actual premium earned at the Policy rate for each month and payment of such premium shall be made before the end of the succeeding month. At the expiration of the Policy, the Company shall return to the Insured the excess of any premium paid by the Insured above the actual premium earned at the rates set forth above, but in no event shall the actual premium earned and retained by the Company be less than the Minimum/Deposit Premium.

5. Cancellation:

In the event of cancellation of this Policy by the named Insured, the earned premium hereunder shall be the proper short rate percentage of the estimated annual premium. The said estimated annual premium shall be determined by dividing the actual premium developed at the Policy rates by the number of days the Policy was in force and multiplying the quotient by 365, but in no event shall the earned premium be less than $100.00, Minimum/Deposit premium set forth above.

6. Audits:

The Company shall be permitted, at all reasonable times during the Policy Period and within one year after its final expiration, to examine the Insured's books and records so far as they relate to the determination of premium for this insurance. In the event that such audit discloses underpayment of premium to the Company, the Insured agrees to pay the Company the amount of additional premium due forthwith. Similarly, if overpayment has been made to the Company, then the Company agrees to return the amount of such overpayment to the Insured forthwith.

7. Gross Weight Limitations:

It is part of the consideration of this policy, and the basis upon which the rate of premium is fixed, that no liability shall attach to this Company for any claim if at the time of any accident the gross weight of the aircraft exceeds the gross weight stipulated in the Civil Aeronautics Authority Airworthiness Certificate of such aircraft.

This endorsement is effective on February 29, 1948, at the same hour indicated in the Policy as the effective hour.

Nothing herein contained shall be held to vary, alter, waive or extend any of the Declarations, Insuring Agreements, Exclusions or Conditions of this Policy other than as above stated.

Attached to and forming part of Policy No. OL 5756 issued by Ohio Casualty Insurance to Harry Phipps dba Phipps Flying Service and/or Coast Sales of El Monte.

AMERICAN AVIATION UNDERWRITERS.
ELLIOTT & COMPANY,

Countersigned
By /s/ E. F. CAWFORD,
Authorized Agent.

It is hereby understood and agreed that the following aircraft are covered under this policy:

C.A.A.	Make	Model	Year	Pass. Capacity Excl. Crew	Premium
NC 29929	Waco	UPF-7	1941	2-place	$90.18
NC 43130	Taylorcraft	BC-1L-65	1946	2-place	90.18
NC 43131	Taylorcraft	BC-1L-65	1946	2-place	90.18
NC 1368K	Luscombe	8-A Std.	1946	2-place	90.18
NC 2899K	Luscombe	8-A Std.	1947	2-place	90.18
NC 2900K	Luscombe	8-A Std.	1947	2-place	90.18
NC 2153K	Luscombe	8-A Std.	1947	2-place	90.18
NC 2826K	Luscombe	8E Deluxe	1947	2-place	90.18
NC 2886K	Luscombe	8E Std.	1947	2-place	90.18
NC 98689	Piper	J-3-C-65	1946	2-place	90.18
NC 98767	Piper	J-3-C-65	1946	2-place	90.18
NC 6417H	Piper	J-3-C-65	1946	2-place	90.18
NC 6763H	Piper	J-3-C-65	1946	2-place	90.18
NC 3446K	Piper	J-3-C-65	1946	2-place	90.18
NC 4667M	Piper	PA-11	1947	2-place	90.18
NC 4905M	Piper	PA-11	1947	2-place	90.18
NC 1613E	Aeronca	7AC	1947	2-place	90.18
NC 2195E	Aeronca	7AC	1947	2-place	90.18
NC 2346E	Aeronca	7AC	1947	2-place	90.18
NC 2962E	Aeronca	7AC	1947	2-place	90.18
NC 8258K	Stinson	150	1946	4-place	76.68
NC 6034M	Stinson	165	1947	4-place	76.68
NC 6127M	Stinson	165	1947	4-place	76.68

Attached to and forming part of Policy No. OL 5756 Ohio Casualty Insurance Company.

Issued to: Harry Phipps dba Phipps Flying Service and/or Coast Aero Sales, a California corporation.

Dated: March 18, 1948.

ELLIOTT & COMPANY,

Countersigned

By /s/ E. F. CAWFORD,
Authorized Agent.

Admitted December 5, 1950.

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 30th day of January A.D., 1951.

/s/ VIRGINIA K. PICKERING,
Official Reporter.

[Endorsed]: Filed February 2, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 41, inclusive, contain the original Complaint; Answer; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Request for Clerk's Transcript and Reporter's Transcript on Appeal and Designation of Record on Appeal which, together with Original Plaintiffs' Exhibits 1, 2 and 3 and original Reporter's transcript of Proceedings on December 5, 1950, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 19th day of February A.D., 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12863. United States Court of Appeals for the Ninth Circuit. The Ohio Casualty Insurance Company, a corporation, Appellant, vs. Ruth M. Petro and John Preston Petro, an infant by Ruth M. Petro, his guardian ad litem, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California Central Division.

Filed February 20, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 12863

THE OHIO CASUALTY INSURANCE COMPANY, a Corporation,

Defendant and Appellant,

vs.

RUTH M. PETRO, et al.,

Plaintiffs and Respondents.

STATEMENT OF POINTS ON APPEAL, AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED

To the Clerk of the Above-Entitled Court, to the Plaintiffs and Respondents in the Above-Entitled Action and to Their Attorneys, Messrs. Lasher B. Gallagher and Bertrand Rhine:

You and Each of You Will Please Take Notice, that the appellant, The Ohio Casualty Insurance Company, a corporation, intends to rely on the following points on the appeal in the above-entitled case:

1. The trial court erred in holding that the policy of insurance issued by appellant to Harry D. Phipps covered the liability of Philip R. Brown for damages arising out of an accident which occurred while Philip R. Brown was operating an airplane owned by Harry D. Phipps.

(a) At the time of said accident Brown was "a

student or renter pilot'' and was excluded from coverage of said policy by the express terms of subdivision (f) of clause III of the Insuring Agreements.

(b) If Brown at the time of the accident was not ''a student or renter pilot,'' then said policy did not cover said accident because the aircraft was not being used for a purpose included in Item 7 of the Declarations contained in said policy, to wit: ''Private business and pleasure, passenger carrying for hire or reward, rental to others and student instruction.''

Appellant hereby designates to be printed the complete record filed in the above-entitled court, including all of the proceedings and evidence in the action and the entire Reporter's Transcript of Proceedings.

Dated: April 17, 1951.

BETTS, ELY & LOOMIS,

By /s/ JOHN A. LOOMIS,

Attorneys for Appellant, The Ohio Casualty Insurance Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 19, 1951.